

Natural Resources, Energy, and
Environmental Law Section
MONOGRAPH SERIES
No. 13

An Analysis and Evaluation of Rules and Policies
Governing OCS Operations

By
Douglas V. Fant



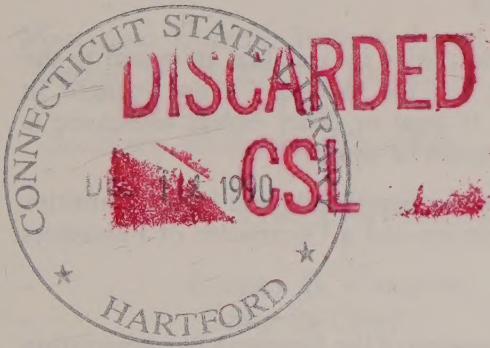
*Section of Natural Resources, Energy,
and Environmental Law
American Bar Association
and
The National Energy Law & Policy Institute
University of Tulsa College of Law*

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AN ANALYSIS AND EVALUATION
OF RULES AND POLICIES GOVERNING OCS OPERATIONS

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Editor's Note: All U.S.C. and C.F.R. cites are to the most recent edition, unless otherwise noted.

An Analysis and Evaluation of Rules and Policies Governing OCS Operations

by Douglas V. Fant¹

I. Introduction

The scope of federal regulation of offshore oil and gas leasing has expanded dramatically over the last decade. A regulatory regime which once involved only a modest number of oil and gas and admiralty legal issues has evolved to include land use, environmental, and safety and health issues as well. Technologically, the industry has moved from drilling in 13 feet of water offshore in 1933 into ever deeper waters in search of new oil and gas reserves. Wells in over 7,000 feet of water have been recently drilled in the Mississippi Canyon planning area.

The Minerals Management Service (MMS) and its predecessor regulatory agency, the United States Geological Survey, was and remains the primary agency for overseeing offshore oil & gas operations. However, one cannot ignore the ever increasing role of the United States Coast Guard (U.S. Coast Guard). That increased roll is perhaps best reflected by the August 1989 Memorandum of Understanding (MOU) entered into between the two agencies, especially in issues involving offshore safety.

Concurrently a new body of both federal and state law is developing which governs on- and offshore disposal of wastes generated by Outer Continental Shelf (OCS) operations. The Environmental Protection Agency (EPA) has published regulations under the Resource Conservation

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and Recovery Act (RCRA) and the Clean Water Act (CWA) to govern disposal of solid and liquid wastes. The EPA also administers the Ocean Dumping Program. The MMS retains jurisdiction over OCS air emissions, but there is a movement afoot in Congress to transfer that jurisdiction to the EPA as well.

Onshore, oil and gas producing states such as Louisiana and California have published waste disposal regulations supplementing the EPA's federal regulatory structure. Freedom from federal regulation over onshore disposal of offshore wastes does not assure the Lessee that the same wastes will be similarly treated under state law.

Of course the traditional Department of Transportation (DOT)/Office of Pipeline Safety and Federal Energy Regulatory Commission (FERC) jurisdiction over offshore pipelines remains intact, as does the Army Corps of Engineers' (COE) control over dredge and fill permits and placement of structures in offshore waters. The Corps' new "no net loss" policy for regulating development of wetlands will likely impact onshore support activities necessary to conduct OCS operations.

Congress is currently considering revising the rules applicable to oil spills in light of the Exxon Valdez oil spill in the Prince William Sound in Alaska and the Mega Borg oil spill offshore Texas, although no final solution has been reached.

Finally, Lessees continually "bump heads" in platform removal operations with the Fish and Wildlife Service and the National Marine Fisheries Service over turtles, dolphins, and other marine species in relation to the requirements of the Endangered Species Act and the Marine Mammal Protection Act. Perhaps the Department of Commerce's rigs-to-reefs program, which authorizes former platforms to be sunk in place offshore, may provide additional habitat for some of those species.

The MMS itself maintains its headquarters in the Washington, D.C. area. However, for operational purposes most decisions emanate from one of four MMS regional offices. Those offices cover the Atlantic Region from Vienna, Virginia; the Gulf of Mexico Region from New Orleans, Louisiana; the Pacific Region from Los Angeles, California; and the Alaska Region from Anchorage, Alaska. Additionally, a novel regulation published in the 1988 revisions to the MMS OCS operating regulations gives the sub-regional offices, i.e., the District offices, some influence over rules applicable to the drilling of OCS wells. See 30 C.F.R. §§ 250.6, .7, .62, .82, and .102.

It is impossible to create an exhaustive manual on OCS operations in a 250 page dissertation. However, this manual attempts to bring together every

authority applicable to OCS exploration, development, and production operations under a subject matter format. Additionally, it offers many insights on the subtle interaction between the various applicable statutes and regulations, and tips for handling situations with which an attorney dealing with offshore operational and regulatory issues is most likely to be confronted.

The interaction between these various regulatory authorities in offshore operations can sometimes become quite complex. Hopefully, this manual will make the interaction a little more comprehensible to you.

The manual focuses to a greater extent on activities in the Gulf of Mexico OCS Region than the remaining three OCS Regions. That is because the Gulf of Mexico OCS Region in 1987 accounted for over 90% of the total federal OCS production of oil, and for 99% of federal OCS production of natural gas. *See* Minerals Management Service 89-0043, OCS National Compendium, September 1988, at 95.

For someone who is new to the world of OCS regulation, the author suggests that you begin by reading Section XV of this manual, "Offshore Structures, Vessels, and Applicable Law." Section XV describes the basic jurisdictional outline of federal and state regulation of OCS operations.

There is a dearth of legal source materials relating to offshore oil and gas leasing issues. Hopefully, publication of this manual will stimulate other individuals into addressing some of the plethora of legal issues facing companies and individuals active on the OCS.

II. Pre-lease OCS Geological and Geophysical Exploration for Oil and Gas

Phase one of acquiring an OCS lease is deciding whether oil or gas may likely be present in a particular location. This decision usually begins with the analysis of some form of seismic data. The data itself is usually generated by third party seismic contractors hired pursuant to permits issued by the MMS under Section 11 of the Outer Continental Shelf Lands Act (OCSLA), as amended. 43 U.S.C. § 1340. Thus, 30 C.F.R. Part 251, which, among other matters, governs the acquisition of geological and geophysical (G&G) data, is relevant to those companies.

Note that pre-lease prospecting for offshore minerals other than sulphur, oil and gas is governed by 30 C.F.R. Part 280. G&G exploratory activities which are not authorized under the terms of an OCS lease, are governed by 30 C.F.R. Part 251. These activities include both pre-OCS lease issuance and off-lease exploratory activities. As noted above, the provisions are relevant to geophysical companies. 30 C.F.R. § 251.3-4.

Permission to conduct geological and G&G activities over leased or unleased blocks must be obtained from the MMS. *See also*, Sections 2(a) and 19(a) of OCS Lease Form MMS-2005. An OCS Lessee has the nonexclusive right to conduct G&G activities on its own lease.

A. Permit Form and Contents: 30 C.F.R. § 251.5.

1. Where to File Applications. File at one of the four regional OCS offices. 30 C.F.R. § 251.5-3.
 - a. Atlantic Coast - Regional Supervisor for Resource Evaluation, Minerals Management Service, Atlantic OCS Region, 1951 Kidwell Drive, Vienna, Virginia 22180. (703) 285-2165.
 - b. Gulf of Mexico - Regional Supervisor for Resource Evaluation, Minerals Management Service, Gulf of Mexico Region, 1201 Elmwood Park Blvd., New Orleans, Louisiana 70123. (504) 736-2504.
 - c. California, Oregon, or Washington - Regional Supervisor for Resource Evaluation, Minerals Management Service, Pacific OCS Region, 1340 West Sixth Street, Los Angeles, California 90017. (213) 894-2048.
 - d. Alaska - Regional Supervisor for Resource Evaluation, Minerals Management Service, Alaska OCS Region, 949 East 36th Ave., Anchorage, Alaska 99508. (907) 261-4010.
2. Permit Form. 30 C.F.R. § 251.5-1. The MMS requires information as to whom is conducting the exploration or research activity and when, where, how and why the proposed activity will take place.
3. Permit Contents. The above lists the requirements for all permits except permits to drill a deep stratigraphic test well. Such a well requires a Drilling Plan as detailed in 30 C.F.R. § 251.6-2. See, 30 C.F.R. § 251.3-5 for General Operational Requirements for Off-Lease G&G Activities.

B. Shallow Test Drilling: 30 C.F.R. § 251.6-1

Shallow test drilling may be authorized for either mineral exploration or scientific research. "Shallow test drilling" is defined as any "drilling into the sea bottom to depths less than those specified in the definition of a deep stratigraphic test." 30 C.F.R. § 251.2(mm).

C. Deep Stratigraphic Well Test Drilling: 30 C.F.R. § 51.6-2

1. A "deep stratigraphic test" involves drilling either through 50 feet of consolidated rock or a total of 300 feet in depth, whichever is the lesser. 30 C.F.R. § 251.2(j).
2. Group Participation 30 C.F.R. § 251.6-3.
 - a. Parties may join together and share in the costs of and results generated by a deep stratigraphic test.
 - b. Late entry penalty - A late entrant to the group may be required to pay an additional 100% of cost to each original participant as well as the original share of cost.
 - c. A party wishing to join the group subsequent to an announcement of a hydrocarbon show by the Director of the MMS (Director) may be required to pay up to an additional 300% penalty as well as the original share of cost.

D. Test Drilling Operations

The rules which govern the drilling of wells under Part 250 also govern drilling operations under Part 251. 30 C.F.R. § 251.6-2(f).

E. Confidentiality of Geological and Geophysical Data or Information Collected Pursuant to a Part 251 Geological and Geophysical Permit 30 C.F.R. § 251.14-1

1. Summary. The length of time which an owner or licensee of data collected pursuant to Part 251 may protect the data from government release depends upon the type of data involved and method of data collection used, as noted below.
2. Raw geophysical data will be released 50 years after the date on which the data are submitted to the Director. 30 C.F.R. § 251.14-1(d)(1).

3. Processed, reprocessed, or interpreted geophysical information will be released 25 years after the date on which the information is submitted to the Director.
4. Deep Exploratory Test Wells. All geological data, information, or interpretations obtained from drilling a deep stratigraphic well will be released 10 years after the date of the permit under which the data or information was obtained.
5. Deep Exploratory Test Wells. Finally, all geological or geophysical data or information, and geophysical interpretations generated by the drilling of a deep stratigraphic test well or submitted in support of an application for a MMS permit to drill a deep stratigraphic test well, will be released at the earlier of: (1) 25 years after completion of the test, or (2) 60 calendar days after the Department of the Interior (DOI) executes a lease for a block, any part of which is within 50 geographic miles of the site of the completed test. 30 C.F.R. § 251.14-1(e).
6. The MMS will not grant extensions for any of the terms listed above. 53 Fed. Reg. 4391 (February 16, 1988).
7. Subsection (a) provides the general caveat that the Director shall make information and data available in accordance with the requirements and subject to the limitations of the Freedom of Information Act, (5 U.S.C. § 552) the implementing regulations of the Act, and 30 C.F.R. Parts 250 and 252. 30 C.F.R. § 251.14-1(a).

The relevant implementing regulation of the FOIA, 43 C.F.R. § 2.13(c)(8), specifically exempts geological and geophysical information and data, and by inference exempts interpretations based thereon, from required disclosure under the FOIA. Thus, the issue is whether either 30 C.F.R. Parts 250 or 252 mandate disclosure of confidential data prior to the time limit established in Part 251.

This is not an easy question. However, the following may be noted. First, the time limits for release of data or information under 30 C.F.R. § 250.18 generally duplicate the types of data or information available under 30 C.F.R. § 251.14. Therefore, the time limits contained in 30 C.F.R. § 250.18 are inapplicable by simple exclusion to 30 C.F.R. Part 251.

Second, the Director might possibly release confidential data gathered under a 30 C.F.R. Part 251 permit to support an accident investigation under 30 C.F.R. § 250.19, or much less likely under 30 C.F.R. § 250.22 use of Best Available and Safest Technologies (BAST), or 30 C.F.R. § 250.12 lease cancellation hearings. These seem the most likely places that the MMS might require a third party permittee under 30 C.F.R. Part 251 to release data to support disputes, over on-lease activities under 30 C.F.R. Part 250.

8. **Prior Disclosure.** Finally, a permittee and its customers may jointly agree to allow the MMS to release confidential data prior to the end of any relevant confidentiality time period. 30 C.F.R. § 251.14-1(b).

Additionally, during exploratory drilling operations on unleased lands, the MMS will announce any "significant hydrocarbon occurrences" or "environmental hazards" which are encountered. 30 C.F.R. § 250.14-1(c)(1).

III. On-Lease Geological and Geophysical Exploration for Oil and Gas

A. Lease Rights

See, § 2(a) of the OCS Lease Form. As noted above, the Lessee has the nonexclusive right to conduct geological and geophysical activities on or across its own lease or have the activities conducted on its behalf.

B. Confidentiality of Lessee-Generated Geological and Geophysical Data: 30 C.F.R. § 250.18

1. Geophysical data or information and interpreted geological and geophysical information (i.e., geological maps produced by the Lessee from its raw data) are protected up to 10 years after the date of submission or so long as the relevant lease is in effect, whichever time period is less.
2. The Director may decide to release the above data or information if he determines that such data are needed to:
 - a. Unitize operations.
 - b. Ensure proper development of a competitive reservoir.

c. Promote safety or protect the environment.

3. The released data or information may only be shown to persons "with a direct (ownership) interest in the affected lease, (unit), or Joint Development and Production Plan." 54 Fed. Reg. 11,966 (March 23, 1989); 30 C.F.R. § 250.18(a) and (b)(4).

Note: Technically, revised 30 C.F.R. § 250.18 is only a proposed rule; however, the MMS has stated that it will nonetheless currently follow the proposed rule as a matter of policy.

4. Geologic data and analyzed geological information are protected up to two years after the end of the primary term of the relevant lease or 60 days after an OCS sale offers tracts within 50 miles of the relevant well, whichever date is later. 30 C.F.R. § 250.18(b).
5. High resolution shallow geophysical data collected pursuant to environmental aspects of lease are protected up to 60 days after the date of submission.
6. Early Release. The Director may authorize earlier release of any of the above data on determination "that earlier release of such information is necessary for the proper development of a unit or competitive reservoir, or to promote operational safety or protection of the environment, but only to persons with a direct (ownership) interest in an affected lease, unit, or competitive reservoir." 30 C.F.R. § 250.18(b)(4).
7. Well Records. Certain portions of well records submitted on MMS Form 330, Well (Re)completion Report, or Form 331, Sundry Notices and Reports on Wells, pursuant to 30 C.F.R. § 250.66, are protected for the same periods of time set forth in 30 C.F.R. § 250.18(b). See 30 C.F.R. § 250.18(d)(1) and (2) for a complete list of protected items in well reports.
8. Well Test and Production Rate Data. The MMS has proposed to clarify when certain production-related data which have been submitted to the MMS may be released to the public. 54 Fed. Reg. 32,316 (August 4, 1989). 30 C.F.R. § 250.18(b). The OCS Order No. 12 governed protection of production-related data, but the MMS rescinded all OCS orders when it published

its 1988 revised operating regulations. The relevant MMS forms and proposed data release dates are as follows:

- a. MMS Form-1866 Request for Reservoir Maximum Efficient Rate; most of items 1 through 33 contained in the report would be protected. See the proposed regulation.
 - b. MMS Form-1867 Request for Well Maximum Production Rate; available for release upon receipt.
 - c. MMS Form-1868 Well Potential Test Report; the MMS proposes to protect from disclosure most data related to well tests. See the proposed regulation for the specific portions of the report to be protected.
 - d. MMS Form-1869 Quarterly Oil Well Test Report; available for release upon receipt; however, same data are protected if submitted on MMS Form 330 Well Completion Report.
 - e. MMS Form-1870 Semiannual Gas Well Test Report; available for release upon receipt; however, same data protected if submitted on the MMS Form 330 Well Completion Report.
 - f. Period of Protection. The data will be subject to the same limitations applicable to geological data and analyzed geological information contained in 30 C.F.R. § 250.18(b).
9. Special Security Handling of Well Logs and Data Generated from Wells Adjacent to Open Acreage. The MMS recently published a Notice To Lessees (NTL) which creates a limited additional protection for any well log or data from a well in which any section of the well bore is within 2,000 feet of open or unleased acreage. NTL 89-02 (March 30, 1989). (The NTL is unclear on this issue, but the open or unleased acreage probably must be federally controlled acreage).

The Lessee or operator must request the special handling and security. Also, the data to be protected must be filed with the MMS within 30 days after completion of the operation which generated the data. The MMS will limit its personnel's access to the data or well logs until the earliest date that one of the

following events occurs: the open or unleased acreage is included in a lease sale offering, the data's proprietary term pursuant to 30 C.F.R. § 250.18 expires, the MMS determines pursuant to 30 C.F.R. § 250.11 that the well is capable of producing in paying quantities, or the Lessee places the lease on production.

IV. Acquisition and Suspension of an OCS Oil and Gas Lease

After a desirable oil or gas prospect has been identified, a party ordinarily attempts to acquire a lease on the acreage where the prospect is located. If the acreage is currently unleased and not restricted from being leased, one needs to attempt to obtain a lease through the MMS's OCS leasing process.

The Secretary of the Interior has been given the authority to plan for and conduct offering of leases on the OCS. 43 U.S.C. §§ 1331-1352. Within the DOI, the MMS has been delegated primary responsibility for management of OCS mineral operations.

Section 18 of the OCSLA, 43 U.S.C. § 1344 as amended, provides that the Secretary of the Interior shall prepare, periodically revise, and maintain an oil and gas leasing program so as to implement the policies of the Act.

The leasing program consists of a schedule of proposed lease sales in various areas on the OCS around the United States including offshore Alaska.

For a more detailed discussion of the OCS leasing process, see, Martin, *Outer Continental Shelf Leases and Operating Regulations*, Law of Federal Oil and Gas Leases, Rocky Mtn. Min. L. Found. 25-1 [hereinafter Martin]. See also, 30 C.F.R. Part 256.

Frequently, a party will seek partners and will then jointly bid upon prospective acreage. The MMS forbids certain larger energy companies from bidding together. 30 C.F.R. § 256.41. Also, in considering joint bidding, one must take care to protect the confidentiality of one's proprietary geological and geophysical data as well as to avoid restraining competition in the Lease Sale process.

If the acreage is already under lease, one needs to arrange a purchase, farm-in, or some similar joint development arrangement with the current Lessee. So long as the joint bidding restrictions contained in 30 C.F.R. § 256.41 are not violated, the MMS will approve such an arrangement. 30 C.F.R. § 256.62.

A. Leases of Other Minerals

For rules governing the acquisition of leases for offshore minerals other than sulphur, oil or gas, see, 30 C.F.R. Part 281.

B. Sulphur Operations

The MMS has proposed specific rules to govern OCS sulphur operations. 54 Fed. Reg. 36,244 (August 31, 1989). This manual does not discuss those proposed regulations except when the proposed rules directly affect OCS oil and gas operations.

C. Bidding Systems/Joint Bidding Requirements applicable to OCS Lease Sales

See, 30 C.F.R. Part 260; *see also*, Martin, 25-19 to 25-27 (brief description of the OCS leasing process).

D. Joint Bidding: Technical and Bid Meetings

1. Summary. Frequently, a party will seek one or more partners to bid jointly upon a prospective block. The primary rationale for seeking partners is the high cost of OCS operations as compared to operations onshore. The cost of drilling and developing a single OCS lease may consume the entire annual exploration budget of a smaller capitalized energy concern. The potential partners must meet in order to discuss the possibility of joint bids.
2. Suggestions. The two primary concerns for any party who participates in either data review or bid determination meetings should be protection of confidential data and avoidance of anti-competitive behavior.
 - a. Confidential Data. A few points should be noted. First, make sure that there are no third party restrictions upon your showing data to potential joint bidders. Second, realize that you need not show all of the data you possess on a particular prospect. Third, have all parties sign a confidentiality statement of some sort prior to revealing any data. Fourth, keep a list of any data shown to potential joint bidders. Finally, do not let any of the data leave the room where the meeting is taking place.

- b. Bid Determination. Here the issue is simple. Potential joint bidders must limit initial discussions about potential prospects to the geological or reservoir potential of the prospect. Do not talk about price, dollars, money, bids, or the like. When the parties agree to submit a bid on a block, sign an agreement wherein the joint bidders agree to establish by secret written ballot the suggested bid for the prospect. Then utilize the highest bid submitted to ascertain whether each bidder wishes to participate in the proposed joint bid.

E. Issuance of a Section 8 Federal OCS Lease: See, 30 C.F.R. Part 256, Subpart G

A "Section 8" OCS lease is any OCS lease issued after 1953 pursuant to the terms of the OCSLA, as amended. Certain terms of what are known as Section 6 OCS leases survived the 1953 implementation of OCSLA. *See*, 30 C.F.R. Part 256, Subpart L. (Section 6 OCS leases were offshore leases issued by the states prior to the 1953 passage of OCSLA on what the states thought in good faith to be state-owned submerged lands. There are very few of these leases extant.)

F. Qualifications of Federal OCS Lessees: 30 C.F.R. § 256.35(b)

Note: The MMS excludes direct holding of OCS leases by aliens, minors, and foreign nationals. 43 C.F.R. § 3102. Foreign participation in limited partnerships is also likely excluded although the issue is not clear. *See*, comment to the revised 43 C.F.R. § 3102.2 at 53 Fed. Reg. 17,342 (May 16, 1988).

G. OCS Lease Term and Size

1. Primary Term and Size. The primary term of an OCS lease may vary in length from 5 to 10 years, depending usually on water depth for leases issued offshore of the continental United States. Arctic OCS leases as well as any deep water OCS leases usually contain primary terms longer than five years due to unusually adverse weather or operational conditions. Note, however, that for leases issued in water depths of 400 to 900 meters, an exploratory well must be drilled within the first five years of the lease regardless of the actual length of the lease term. 30 C.F.R. § 256.37.

Generally, an OCS lease may not exceed 5,760 acres in area, unless the Secretary makes a finding that a larger lease is necessary "to comprise a reasonable economic production unit." 43 U.S.C. § 1335(b)(1).

2. Secondary Term. The OCS lease habendum clause is unique. An OCS lease beyond its primary term

"as long thereafter as oil or gas is produced from the leased area in paying quantities, or drilling or well reworking operations, as approved by lessor, are conducted thereon, or as otherwise provided by regulation." Section 3 of MMS Form-2005. *See also*, 30 C.F.R. § 256.70.

The phrase "or as otherwise provided by regulation" distinguishes the habendum clause of an OCS lease from the habendum clause contained in a typical onshore oil and gas lease form.

- a. Producing, Drilling, and Well Reworking Operations. 30 C.F.R. § 250.13. The MMS regulations state that any such operations will maintain an OCS lease in its secondary term indefinitely so long as there is no lapse greater than 90 days between such operations. 30 C.F.R. § 250.13(a).

The Lessee may petition the Director to lengthen the lapse up to 180 days, or even beyond 180 days when environmental conditions justify the extension. 30 C.F.R. § 250.13(b). Note, that the extension is not automatic.

Note, that directionally drilled wells will maintain an OCS lease just as if the well's surface location had been located on the lease in question. 30 C.F.R. § 256.71.

- b. Lease Maintenance-Secondary Term. *See*, 30 C.F.R. § 250.13 which "supplements" the above language in Section 3 of the OCS Lease Form by citing "production" as an additional method by which a Lessee may extend a lease. Also, the MMS needs to revise 30 C.F.R. § 256.70 so as correctly to cite 30 C.F.R. § 250.13.

- i. What is "Production"? The current MMS position is that actual production is necessary to maintain a lease. That position appears to take an overly restrictive view of and conflict with the statutory definition of the term production, especially since the OCSLA, as amended, defines "production" much more broadly than the mere physical production of oil or gas. *See*, 43 U.S.C. § 1333(m) and 30 C.F.R. § 250.2.

For a more thorough discussion of the issue see, D. Fant, 30 C.F.R. § 250.13(a) *Producing, Drilling, or Well Reworking Operations on OCS Leases*, *The Landman*, September/October 1989.

- ii. NTL 89-05, Gulf of Mexico; Dated September 29, 1989. As noted above, the Director MMS may in certain circumstances approve lapses between producing, drilling, or reworking operations for periods of greater than 90 days. In response to the limited availability of deepwater drilling rigs in the Gulf of Mexico, the MMS published NTL 89-05.

In NTL 89-05 the MMS has approved lapses of up to 180 days for deepwater Gulf of Mexico OCS leases (leases in waters of 400 meters depth or more) between the drilling of exploratory wells. Note, that the time between production activities and well workovers remains 90 days.

- c. Determination of Well Producibility. "Production in paying quantities" may be determined in a unique fashion for federal OCS leases. That is, the MMS has a rule which allows an OCS Lessee to show that a well is capable of producing in paying quantities prior to actual commercial production from the well. 30 C.F.R. § 250.11.

Formerly called an OCS Order No. 4 well determination, 30 C.F.R. § 250.11 requires an OCS Lessee to meet either certain well test criteria or submit certain technical data to prove that a well is capable of producing in paying quantities. The 1988 regulatory revisions incorporated OCS Order No. 4 directly into 30

C.F.R. § 250.11 with two significant changes. First, a Lessee must no longer submit a producibility determination on every well drilled on its lease. This revision has strategic and also potential gas regulatory consequences.

Strategically, one no longer needs to reveal to the world that multiple producible wells exist on a lease. This may be important if the adjacent lease block is open and available in an upcoming OCS lease sale.

Second, the MMS clarified that a Lessee must meet all of the technical criteria set forth in 30 C.F.R. § 250.11(b) in order to qualify for a determination of well producibility. Previously the determinations were approved when only part of the criteria were met. Thus it is now more difficult to obtain a determination of well producibility.

As to gas regulatory concerns, would the lack of a well determination of producibility affect a classification determination under the Natural Gas Policy Act § 102(d) (NGPA)?

- d. Query: Does production from offshore pooled leases constitute production from the "leased area"? Under former 30 C.F.R. § 250.52, the answer was no. However, 30 C.F.R. § 250.52 was eliminated from the 1988 Revisions to the Operating Regulations. But see, 30 C.F.R. § 250.190 which by inference suggests the answer to the above question would be the same.
3. Suspensions of Production, Operations, or Other Activities. 30 C.F.R. §§ 250.10 and 256.73.
- a. Summary. The MMS authorizes a Lessee, under certain conditions, to request or the MMS itself to initiate suspension of any lease activity on any lease in either its primary or secondary term. 30 C.F.R. § 250.10(a); Section 13 of OCS Lease Form MMS-2005 (March 1986). A suspension, either of operations or of production, if granted by the MMS, functions similar to a shut-in royalty payment under an onshore oil and gas lease, and tolls the running of the lease term regardless of whether the lease is in its primary or secondary term.

30 C.F.R. § 256.73. A suspension granted by the MMS in the primary term of an OCS lease will in most cases actually extend the primary term for a period of time equivalent to the period that the suspension was in effect. 30 C.F.R. § 250.11(f). Under the shut-in royalty payment clause of a standard onshore oil and gas lease, the primary term of the lease will continue to run regardless of whether shut-in royalty payments are made.

Does the Lessee need to continue to pay either rentals or minimum royalties (after a discovery of oil or gas in paying quantities on the lease or leases unitized therewith) on its lease during the term of the suspension? The regulations and OCS Lease Form are silent on this issue. However, the wording contained in sections 4 and 5 of the OCS Lease Form relating to such payments appears to be mandatory. Thus, the safest interpretation is to continue to pay the relevant lease maintenance payment during the period of suspension, unless the lease is otherwise independently maintained.

- b. Suspension of Leases in Primary Term. An OCS lease will not expire so long as suspension remains in effect, and the primary term of the lease shall be extended for a period of time equal to the period of the suspension. 30 C.F.R. § 256.73(a). But compare, 30 C.F.R. § 250.10(g) which contradicts § 256.73 and limits the effect of the suspension when the suspension is precipitated by a Lessee's gross negligence or intentional violation of regulations. The correlation between 30 C.F.R. § 250.10 and the primary term exploratory well drilling requirement of time in 30 C.F.R. § 256.37(a)(2) for leases in water depths of 400 to 900 meters is unclear. Note also: the MMS needs to revise its citations contained in 30 C.F.R. § 256.73.
- c. Suspension of Leases in Secondary Term. Note, that for leases beyond their primary term, a suspension will only maintain the lease so long as the suspension itself remains in effect. 30 C.F.R. § 256.73(b).
- d. Temporary Abandonment. In August 1986, the MMS proposed a rule authorizing "temporary abandonment"

of an OCS well for six month intervals. 50 Fed. Reg. 29,947 (August 21, 1986). However, as of July 1, 1990, no subsequent action has been taken on the proposed rule.

4. **Suspensions of Operations.** The Regional Supervisor may suspend any operation or activity individually and/or suspend the operation or activity as to all or part of a lease. 30 C.F.R. § 250.10(a). The MMS has yet fully to define its approach in this area. However, the MMS has informally created two types of suspensions of operations (SOO's), a lease suspension of operations and a directed suspension of operations.
 - a. **Lease Suspension of Operations.** This form of SOO is a variety of offshore "force majeure" clause. Such a SOO usually may be requested by the Lessee usually only for the purpose of allowing additional time to commence drilling operations when those operations are inhibited by reasons beyond the control of the Lessee. Those reasons include unexpected weather and unavoidable accidents. Note that lack of rig availability is not a justification for a SOO.
 - b. **Directed Suspension of Operations.** The MMS on its own behalf may direct a SOO whenever exploratory operations are affected, usually by the occurrence of conditions contained in stipulations attached to the OCS Lease Form. Those include, for example, activities in a Military Warning Area, or the allowance of studies for environmentally-related reasons.
5. **Reasons Justifying Suspension of an OCS Lease Term.** 30 C.F.R. § 250.10.
 - a. **Historical Authority.** OCS Gulf of Mexico Order No. 14, effective January 1, 1977, was previous authority for suspension. The Order was implicitly repealed by 1978 Amendments to Section 5 of the OCSLA and explicitly repealed by the 1988 revisions to the MMS operating regulations. *See also*, former 30 C.F.R. § 250.12 initially promulgated October 26, 1979, 44 Fed. Reg. 61,892, as amended in 1980, 1982, 1984, and 1985.

- b. As previously noted, the Lessee may request, or the Regional Supervisor may institute a suspension. 30 C.F.R. §§ 250.10(a) and (b).
- c. Certain types of 30 C.F.R. § 250.10(a) suspensions require, as a prerequisite, a determination of well producibility. *See*, 30 C.F.R. § 250.11.

Note also, one exception contained in 30 C.F.R. § 250.10(c). For leases in water depths of 400 to 900 meters, which contain a special lease stipulation, the MMS is mandated to suspend activities for the length of time (not to exceed five years) necessary to complete the activities in an approved Development and Production Plan. *See*, 30 C.F.R. § 250.34.

- d. Negative Reasons for Suspension:
 - i. failure to comply with terms of the OCSLA, as amended, regulations, lease or permit;
 - ii. threat of serious harm to life, property, environment, or mineral deposit;
 - iii. national security or defense;
 - iv. to meet National Environmental Policy Act (NEPA) requirements or conduct an environmental analysis.
- e. Positive Reasons for Suspension:
 - i. facilitate preparation of an Environmental Impact Statement (EIS);
 - ii. facilitate proper development of a lease;
 - iii. allow construction of, or negotiation for production or transportation facilities;
 - iv. facilitate installation of safety or environmental equipment;

- v. allow for "inordinate delays" in acquiring required permits, including administrative or judicial challenges;
 - vi. allow time to enter into a sales contract, when good faith efforts to secure such contract are made;
 - vii. allow time to commence drilling operations when good faith efforts are prevented by reasons beyond Lessee's control, such as unexpected weather or unavoidable accidents;
 - viii. to avoid premature abandonment of producing wells, or uneconomic operations. *See*, 30 C.F.R. § 250.110-114.
- f. The interaction between the well abandonment provisions in Subpart G of 30 C.F.R. § 250.10, the rules governing suspension of a lease term to avoid premature abandonment of producing wells, and the due diligence requirement contained in section 8(b)(4) of the OCSLA, as amended, is unclear. On the one hand, a Lessee cannot abandon any producing well, even a marginal well, without prior MMS approval. On the other hand, a Lessee is required diligently to develop its lease, at least any lease issued since 1978. How the MMS will utilize the suspension power to maneuver between these two potentially conflicting requirements remains to be seen.
- g. NTL 86-07, issued August 21, 1986, authorizes a suspension for developed leases with marginal wells "where lease revenues are insufficient to offset lease operating costs." However, such a suspension terminated August 31, 1987, by the terms of the NTL.
6. Leases in 400 to 900 meters water depth. Suspend to complete activities in approved Development and Production Plan. *See*, 5.c. above.
7. Filing requirements. The Lessee must submit a work schedule along with the request for suspension. The schedule must detail the work leading to the start or restoration of the suspended activity. 30 C.F.R. § 250.10(i). Note, that the MMS

monitors the Lessee's progress based upon the activity schedule you have submitted. Also, if the operator seeking the suspension is not a Lessee of record (e.g., a farmout) then the MMS will require a letter from at least one Lessee concurring in the proposed suspension and activity schedule.

8. Factors considered by the MMS for all suspensions:
 - a. Is the proposed suspension in the national interest?
 - b. Has the Lessee been diligent in exploration of the lease, i.e., drilled any wells, and delineated any reservoirs?
9. Length of suspension.
 - a. The MMS may suspend a lease term up to five years per suspension. 30 C.F.R. § 250.10(e).
 - b. The Lessee may request a subsequent suspension.
 - c. The suspension terminates automatically on commencement of production or any other suspended activity. 30 C.F.R. § 250.10(k). See 30 C.F.R. § 250.2 for the definition of "production," which is a much broader application of the definition of production than used by the MMS in the context of 30 C.F.R. § 250.13.
 - d. The Director may also terminate suspension when the Director determines that the circumstances which justified granting the suspension no longer exist. Director must send notice of any such termination to Lessee(s). 30 C.F.R. § 250.10(j).
10. Suspensions and Lease Rental or Minimum Royalty Payments. 30 C.F.R. § 218.154. The above regulation has not been revised to coordinate with the newly redesignated regulation for suspensions. 30 C.F.R. § 250.10. It is unclear under which types of suspensions that rental and/or minimum royalty payments must continue. Until the provisions are coordinated, the author advises paying the relevant payment to the MMS or at least calling the local MMS office for clarification. Otherwise a party may inadvertently lose an OCS lease.

11. Temporary Prohibitions of Production, or Other Activities.

- a. The term "temporary prohibition" has not been defined by the MMS. Thus, the distinction between a "suspension" and a "temporary prohibition" is unclear. Section 250.10(a) is written to suggest that a suspension and a temporary prohibition apply equally to the same subject matter or to the same lease, or portions thereof. Thus, the author suggests that the MMS define a "temporary prohibition" alternatively as cessation of any non-production related activity; or define "temporary prohibition" at least for any lease in its secondary term simply as any cessation of activity or activities which does not cause the lease to expire under the relevant time limits contained in 30 C.F.R. § 250.13.

Otherwise, the MMS should delete the concept from its revised regulations as redundant to the concept of a suspension.

- b. Production in Paying Quantities. What if the MMS orders a Lessee to cease production temporarily from a particular well on its lease? Without that production the Lessee cannot produce the lease in paying quantities. What result? The answer is unclear. 30 C.F.R. § 250.10 does not clarify the effect of a "temporary prohibition" anywhere in any of its provisions. On the other hand the term "production" contained in 30 C.F.R. § 250.73 may perhaps be interpreted to include partial cessations of production on a lease ordered by the MMS, and not just total cessations thereof.

12. Lease Size. Leases may not contain more than 5,760 acres, unless the Secretary of Interior finds that "a larger area is necessary to comprise a reasonable economic production unit." 43 U.S.C. § 1337(b)(1).

H. Lease Location NAD 27/NAD 83

Currently, the federal government employs 1927 Department of Commerce National Geodetic Survey baseline data *inter alia* for purposes of locating various points and objects offshore. The Federal Geodetic Control Committee voted on December 5, 1989, to update the locating system by employing newer satellite assisted 1983 baseline data (NAD 83).

The revision in data bases could affect the location of OCS leases offshore, and raise many thorny issues as to royalties, lease line wells, boundaries, etc. The MMS generally affirmed that existing OCS lease rights will not be affected. 55 Fed. Reg. 3494 (February 1, 1990). However, final resolution of the issue is unclear.

V. The OCS Lease - Form MMS-2005 (August 1986); Bonding Requirements and Assignments

All OCSLA Section 8 leases are issued under the current version of standard Lease Form MMS-2005. 43 U.S.C. § 1337. The term "Section 8 leases" simply refers to any OCS lease issued by the federal government under the OCSLA, as amended, since the 1953 passage of the Act. Section 6 of the Act, 43 U.S.C. § 1335, ratified certain offshore leases that had previously been issued prior to 1953 by state agencies on what the states then thought to be state offshore lands. Those leases are known as "Section 6 leases." However, very few of those leases are still extant. The OCS lease form itself has undergone many permutations since its initial publication in 1954. Each OCS lease form should be scrutinized in order to verify whether that particular version of the lease contains the particular clause of the current lease form as discussed below.

As previously noted, the primary term of a Section 8 OCS Lease can vary from five to ten years. 43 U.S.C. § 1337(b)(2). In the Gulf of Mexico, for example, shallow water leases contain five- year primary terms. Since the 1984 OCS Lease Sale No. 81, leases issued in water depths between 400 and 900 meters contain eight-year primary terms, but require the Lessee to drill a well within the first five years thereof. Finally, the primary term of all leases issued since 1983 in water depths greater than 900 meters contain ten-year primary terms with no time limit on drilling the initial well.

The MMS also supplements the standard lease terms by adding stipulations to the standard form at the time of such OCS Lease Sale. The stipulations to be added to particular leases are published in the Federal Register Notice of Lease Sale so that any potential Lessee is aware prior to bidding on a particular OCS block of any restrictions on exploring or developing that block.

In addition, the MMS requires any Lessee or operator to post a general performance bond before engaging in any activities on the OCS. Those bonding requirements are discussed in this section in the context of Section 21 of the OCS Lease Form. 43 U.S.C. § 1337.

A. Rentals

The Lessee must pay lease rentals, as stipulated in the lease, annually prior to a discovery in paying quantities and on or before first day of the lease year. Lease Section 4.

B. Minimum Royalty

Must be paid annually subsequent to discovery of hydrocarbons; Lessee generally must pay at end of each lease year, even if the lease is in suspended status pursuant to 30 C.F.R. § 250.10.(b)(5). *See*, 30 C.F.R. § 218.154. The only exception to the payment requirement is when the MMS orders the suspension pending a possible cancellation of the lease. (The MMS needs to revise its citations in § 218.154 to include the current 30 C.F.R. § 250.10 suspension provision.)

1. The MMS does not indicate whether minimum royalties constitute "production" under 30 C.F.R. § 250.13, so as to maintain in a lease in its secondary term. Neither Section 3, Term, nor Section 6, Royalty on Production, indicate whether such payments will maintain the lease in effect. However, in light of the language in Section 5, it appears the best interpretation is that the MMS meant minimum royalties to function similar to the former compensatory royalties regulation. *See*, former 30 C.F.R. § 250.33.
2. *See also, Morris Exploration Company v. Guerra*, 751 S.W.2d 710 (Tex. Ct. App. 1988), where a Texas appellate court held that under Texas law that payment of minimum royalties pursuant to a minimum royalty provision in a lease would not continue the lease in effect absent actual oil or gas production.

C. Royalty on Production: Lease § 6

1. Royalties are due on gas negligently lost or wasted (but implicitly not on gas used for operations). 30 C.F.R. § 202.150(b)(1).
2. Value of production for royalty purposes is never less than "fair market value" of production.
3. The MMS may take its royalty portion of production in kind. *See*, 30 C.F.R. Part 208 for Sale of Federal Royalty Oil regulations governing such transactions.

4. **Royalty Rate Relief.** The Secretary may authorize the reduction or elimination of any federal royalty burden, including net profit share royalty burdens. 43 U.S.C. § 1337(a)(3). To date, the DOI has not issued any guidelines as to how to apply for such relief. For guidance however, one might review the Bureau of Land Management (BLM) guidelines for seeking royalty relief on federal coal and other solid mineral leases. *See*, "Royalty Rate Reduction Guidelines for Solid Leasable Minerals." 52 Fed. Reg. 24,347 (June 30, 1987), as clarified 55 Fed. Reg. 18,401 (May 2, 1990).

D. Lease-Related Payments

The MMS requires electronic funds transfers to the MMS Royalty Accounting Office unless otherwise provided by regulation. Lease § 7. *See also*, 30 C.F.R. § 218.51.

E. Operations on Lease

Operations must be conducted in accordance with approved Plan of Exploration or Plan of Development and Production. *See*, Sections XI and IX *infra*.

F. Directionally-Drilled Wells: Lease § 11

If a well bottoms on the particular OCS lease, then it will maintain the lease regardless of the surface location of the well. In addition, for purposes of lease maintenance, commencement of drilling the directional well on an adjacent lease is considered by the MMS to be drilling on the leased area itself. 30 C.F.R. § 256.71.

G. Disposition of Production: Lease § 15

Must offer 20% of crude oil, condensate and NGL's produced from each OCS lease to small or independent refiners. 43 U.S.C. § 1334(b)(7). Note, that this requirement is in addition to the MMS' right to take its royalty share of production in kind.

H. Unitization, Pooling and Drilling Agreements: Lease § 16

The MMS can force Lessee to pool or unitize its lease with adjacent leases. *See*, Section XVII *infra* for an extensive discussion of offshore pooling and unitization.

I. Remedies in Case of Default: Lease § 13

The 1978 Amendments to the OCSLA specifically empowered the Secretary of the Interior to cancel a previously issued OCS lease for a variety of reasons. 43 U.S.C. §§ 1334(d) and (3), and 1337(b)(5). The power to cancel leases in order to protect the environment was upheld in *Village of False Pass v. Watt*, 565 F. Supp. 1123 (D.C. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984).

J. Due Diligence

The OCSLA requires any post-1978 OCS lease to contain provisions relating to due diligence. 43 U.S.C. § 1337(b)(4) (1988). Currently, none appear in the revised form. However, it is best to assume that a Lessee is subject to a duty of reasonable development. Whether this express but undefined statutory due diligence requirement replaces traditional implied covenants of development is unclear. In the author's experience, the issue has never been considered by the MMS or deliberated by the Interior Board of Land Appeals (IBLA) or any court.

K. Transfer of Lease or Lease Interest: Lease § 20

1. Summary. The MMS must approve any assignment of an undivided interest in an OCS lease or part thereof. 30 C.F.R. § 256.62(a). The assignments must be filed within 90 days of execution with the relevant MMS regional office. 30 C.F.R. § 256.64(a). An individual assignment document must be filed for each lease. 30 C.F.R. § 256.67. Note, that the proposed assignee must be a citizen of the United States, an association of citizens of the United States, or a corporation organized under United States or state law. 30 U.S.C. § 181; 43 C.F.R. Subparts 3102 and 3106.2.

The MMS filing requirement is independent of any state acknowledgement or recording requirements. Recording assignments in all counties adjacent to the OCS planning area is necessary in order to protect against possible claims by subsequent purchasers of an interest in the OCS lease, or against the grantor's trustee in bankruptcy if the occasion ever were to arise.

Thus, as a simple precaution, when preparing an assignment of an OCS lease, be sure that the assignment form also complies with the acknowledgement and recording requirements of the

state adjacent to the location of the OCS lease. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *on remand*, *McKenna v. Wallis*, 366 F.2d 210 (5th Cir. 1966).

The Fifth Circuit Court of Appeals recently held that subcontractors had the right to assert liens against an offshore pipeline project under the Louisiana Oil Well Lien Act. Additionally, the Court held that the subcontractors had properly perfected the liens by filing notice thereof with both the MMS and the adjacent Louisiana Parish. *Union Texas Petroleum v. PLT Engineering Inc.*, 895 F.2d 1043 (5th Cir. 1990).

One Texas District Court similarly held, without analyzing the issue, that the only way to perfect a supplier's lien on an OCS lease is to comply with the Texas Property Code requirements. *World Hospitality Ltd. v. Shell Offshore, Inc.*, 699 F. Supp. 111 (S. D. Tex. 1988). While not dispositive of an assignment of an interest in a federal mineral lease pursuant to federal regulations, the case suggests that courts will quickly resort to state property laws to fill in any gaps in federal OCS acknowledgement and recording requirements.

2. Transactions Subject to Rules. The MMS requires the Lessee to "file for approval . . . any instrument of assignment or . . . transfer of [the] lease or any interest therein." This appears to include all transfers such as sales, farmouts, and partial assignments of operating rights in an OCS lease block.
3. Effective Date and Liability. At least for purposes of satisfying MMS regulations, no transfer of a lease or an interest in a lease is valid until the MMS has approved the transfer. 30 C.F.R. § 256.62. The assignor remains liable for "all obligations under the lease accruing prior to the approval of the assignment." 30 C.F.R. § 256.62(d). Be careful to draft supporting insurance and indemnity provisions in the assignment agreement to accommodate this fact. Note, that under proposed 30 C.F.R. § 256.62(e), the MMS may require a previous OCS lease owner to remain liable for post-assignment activities on an assigned lease up to the amount of its surety bond. *See*, Bonding Requirements *infra* at subsection N.

The effective date of transfer unless otherwise requested by the parties is the first day of the lease month following its filing in the local MMS office. 30 C.F.R. § 256.62(c). Make sure in

any OCS farmout or assignment to heed this prerequisite to the validity of the agreement, as well as the procedural requirements contained in 30 C.F.R. § 256.64.

4. Segregated Leases. Note that if a Lessee assigns his entire interest in a portion of a lease as compared to assigning operating rights only as to various depths, that he creates two separate OCS leases. 30 C.F.R. § 256.68.

L. Surrender of Lease and Removal of Structures: Sections 21 and 22

See Section XIV *infra* for an extensive discussion of the requirements applicable to abandoning platforms or other structures on OCS leases.

M. Special Lease Stipulations

The Notice of Sale in each OCS lease sale will often contain special requirements that are to be incorporated into certain OCS leases issued pursuant to that OCS sale. Common stipulations address the following concerns:

1. Presence of Shipping Fairways.
2. "Topographic Features" stipulation or areas of special biological concern.
 - a. NTL 89-01 Gulf of Mexico Region effective August 1, 1989, creates a standard "topographic features" stipulation for use in the central and western Gulf of Mexico. For OCS leases issued prior to 1987 in the above areas a Lessee may either comply with the terms of NTL 89-01 or with the older version of the stipulation contained in the lease.
 - b. NTL 89-01 creates four zones around a specified topographic feature.
 - i. No Activity Zone - No structures, rigs, pipelines, or anchoring is allowed within the listed isobath.
 - ii. 1,000 Meter Zone - All drill cuttings and drilling fluids must be shunted to the bottom of the ocean through a downpipe that terminates no more than ten meters from the seafloor.

- iii. One Mile Zone - Same as above restriction for the 1,000 Meter Zone.
 - iv. Three Mile Zone - All drill cuttings and drilling fluids from development operations only must be shunted through a downpipe that terminates no more than ten meters from the seafloor.
- 3. Local Military Activities. Occasionally, a submarine warfare practice area of a bombing and gunnery range lay adjacent or over a portion of an OCS lease. 32 C.F.R. Part 252. See the discussion at Article XII.Y *infra* of the Department of Defense Offshore Military Activities Program.
 - 4. Timing of exploration and development activities.

N. Bonding Requirements: 30 C.F.R. § 256.58-.62

- 1. Summary. The MMS currently requires any bidder on an OCS lease to post a \$50,000 bond conditioned upon compliance with the terms and conditions contained in the lease before the MMS will issue the lease.

Alternatively, the bidder may post a \$300,000 area-wide bond in place of individual \$50,000 bonds for each lease. 30 C.F.R. § 256.58(a). The MMS for bonding purposes has created four "areas"; Alaska, the West Coast, the East Coast, and the Gulf of Mexico.

The MMS may cancel all leases covered by any defaulted or insufficient bond. 30 C.F.R. § 256.58(f). The MMS requires the bond (depending on whether the bond is only a mineral Lessee's bond or also includes the party's status as an operator) to be submitted on either MMS Form 2028 or 2029. 30 C.F.R. § 256.59.

Finally, the MMS may require additional security if necessary after operations commence, prior to an assignment of interest in the lease, or whenever the MMS decides that the Lessee is financially incapable of carrying out its obligations under the lease. 30 C.F.R. § 256.61 and NTL 89-07, Supplemental Bonds, dated December 15, 1989. The MMS supplemental bond requirements have yet to be tested against the powers of a trustee in bankruptcy where the Lessee has filed for bankruptcy court protection.

2. **Proposed Revisions.** The current MMS bonding requirements were established over 20 years ago and are clearly insufficient to cover the costs of abandoning an offshore platform or other structures and performing a site clearance verification as required by the operating regulations. 30 C.F.R. § 250.143. On January 24, 1990, the MMS proposed revised and increased bonding limits and requirements. 55 Fed. Reg. 2388 (January 24, 1990); correction 55 Fed. Reg. 3603 (February 2, 1990).

The MMS has proposed to break the bonding requirement into a two tier structure, to be triggered by the Lessee's submittal either of an Exploration Plan or of a Plan of Development and Production. *Id.*

The current one lease/areawide coverage of \$50,00/\$300,000 would be increased to \$200,000/\$1,000,000 prior to approval of an Exploration Plan, or \$500,000/\$3,000,000 prior to approval of a Plan of Development and Production. *Id.*

Finally, the MMS proposes to require all new bonds to be issued by a surety certified by the U.S. Department of Treasury. *Id.*

VI. Exploratory Activities

A. Plan of Exploration (POE): 30 C.F.R. § 250.30

1. **Summary.** No exploratory activities, except for some minor non-intrusive preliminary activities (as defined in 30 C.F.R. § 250.31) may be commenced or conducted on a lease except in accordance with an exploration plan approved by the Director of MMS (referred to hereafter either as Plan of Exploration or a POE). 30 C.F.R. § 250.30.

Preliminary activities. "Those which do not result in penetration of the seabed of greater than 500 feet and which do not result in any significant adverse impact on the natural resources of the OCS." 30 C.F.R. § 250.31.

2. A POE may apply to a single lease or a group of leases, and may be submitted by one Lessee or a group of Lessees. *Id.*

B. Environmental Report: Former 30 C.F.R. §§ 250.33 and .34

1. The MMS, in its 1988 regulatory revisions, has eliminated the concept of an Environmental Report. Relevant reporting requirements have been merged into the requirements for a POE (or Development and Production Plan) itself. Note, however, the caveat contained in the preamble to the regulations as to the importance of submitting environmental data supporting the proposed POE. "[E]ven though the supporting information is not subject to specific MMS approval, MMS can disapprove a plan based on inadequate or inaccurate information." *Id.*
2. Formerly not required for leases in Western Gulf of Mexico (mouth of Mobile Bay westward) unless state has Coastal Zone Management Act (CZMA) plan in effect (all Gulf states except Texas) *and* proposed activities would affect a land use or water use in the coastal zone of a state (i.e., more likely near-shore activities). Former 30 C.F.R. § 250.34-1(a)(2)(ii) (1987). However, under 30 C.F.R. § 250.30(b), all Lessees in the Gulf of Mexico will be required to submit certain environmental information so that the MMS may satisfy certain NEPA and CZMA requirements.

C. Time of Submission, Plan of Exploration

1. The previous generic time limits for filing a POE have been eliminated from the revised regulations. However, this does not mean that the filing requirement has been completely eliminated.
2. Special Lease Stipulations. One must check each Notice of OCS Lease Sale under which the particular lease was issued to verify whether special time-related lease stipulations are applicable to a particular lease. These requirements may affect the timing of filing a POE with the MMS.
3. Suspensions of Production (SOP) and Well-Drilling Requirements. Note, however, that most forms of SOP's require as a prerequisite to granting that a well be drilled on the lease for which an SOP is requested. Note also, that for leases issued in 400 to 900 meters water depth that the MMS requires that an exploratory well be drilled within the first five years of the lease term. 30 C.F.R. § 256.37. Obviously, in order to satisfy these requirements, one needs to have an

approved POE in place prior to drilling a well, and as such would affect the timing of filing a POE.

D. Contents of Plan: 30 C.F.R. § 250.33

1. The Plan does not have to contain an exact plan of proposed activities. For example, the POE can include proposed wells that may never be drilled.
2. Requirements. There are two sources for ascertaining what should be put into a POE. First, 30 C.F.R. § 250.33 establishes the basic requirements for a POE. Second, the MMS also issued three "Letters to Lessees" dated October 12, 1988, September 5, 1989, and September 27, 1989, for the POE's and Development Operations and Coordination Documents filed for leases in the Gulf of Mexico Region. Those three letters are attached hereto as Appendix A.
 - a. General Timetable and Type and Sequence of Exploration Activities. 30 C.F.R. § 250.33(a)(1).
 - b. Drilling Program and Drilling Unit. Alaska OCS Lessees must submit more detailed information including a course of action for drilling a relief well or loss of the rig or supporting marine craft in the severe Alaskan weather. 30 C.F.R. § 250.33(a)(2).
 - c. Approximate locations, well and water depths for any proposed exploratory well. (Be sure to include all possible proposed well locations so as to alleviate the necessity for seeking state CZMA approval for a revision to your POE. See Section F below.) 250.33(a)(3).
 - d. Structure maps, velocity data, and structure sections, seafloor and subsurface hazard data. 250.33(b)(1).
 - e. Reference to an Oil Spill Contingency Plan. 250.33(b)(2). See Article XII.I(5)(d) for more detail as to what should be contained in an Oil Spill Contingency Plan.
 - f. Measures proposed to satisfy lease stipulations. 250.33(b)(3).

- g. Types, proposed usages, and composition of drilling fluids, cutting discharges, and methods of disposal. (Be sure to correlate drilling fluids mentioned in your annual EPA Discharge Monitoring Reports with those fluids proposed for use in the POE.) 250.33(b)(4).
- h. Certain information concerning the presence of Hydrogen Sulfide. 250.33(b)(5).
- i. Detailed discussion of new or unusual technology to be utilized. (Correlate with any potential Occupational Safety and Health Act requirements.) 250.33(b)(6).
- j. Leases in Western Gulf of Mexico - a brief description of onshore support facilities. All other OCS Lessees must submit more detailed information on the facilities and their impact on local communities detailed in the five requirements at 30 C.F.R. § 250.33(b)(8)(I-IV).
- k. Quantity, composition, and method of disposal of wastes and pollutants generated by offshore, onshore, and transportation operations. 250.33(b)(9).
- l. Weather patterns, oceanography, and on-site flora and fauna. 250.33(b)(10-12).
- m. Environmentally sensitive areas (offshore and onshore) including areas of particular concern identified by coastal states pursuant to the CZMA. 250.33(b)(13).
- n. Onsite uses archaeological and cultural uses in the area around the lease(s). 250.33(b)(14-15).
- o. Environmental monitoring systems as well as an assessment of the direct and cumulative environmental impacts expected to occur under the POE. 250.33(b)(16-17).
- p. Certificate of coastal zone consistency per 15 C.F.R. Part 930. 250.33(b)(18).
- q. Air quality impacts for each OCS facility for all new POE's and for certain current POE's. *See* 30 C.F.R. § 250.45(a) and (b). 250.33(b)(19).

- r. Name, address, and telephone number of contact employee for the Lessee(s). 250.33(b)(20).
- 3. Incorporation by reference of previously submitted or otherwise readily available data. 30 C.F.R. § 250.33(c).
- 4. Dynamic Tension in the Documentation Process. A Lessee must put enough detail in its proposed POE to allow flexibility for unexpected contingencies which will likely arise in carrying out its exploration plans. On the other hand, putting too much detail and including too many contingent plans in the proposed POE invites challenges by a coastal state that the plan is inconsistent with state's Plan.

E. Submission of Plan of Exploration to MMS: 30 C.F.R. § 250.33(e)

- 1. The POE is not deemed submitted by MMS until:
 - a. The Director has determined that information submitted in the POE pursuant to above requirements is complete. (Such determination made within 10 days of filing.)
 - b. Within two working days after the POE is deemed submitted, the Regional Supervisor will transmit the POE to each affected state for CZMA consistency review. Receipt of the POE by state begins the consistency review period. 30 C.F.R. § 250.33(f).
- 2. A POE is approved or disapproved with suggested revisions within 30 days of when the POE was deemed to be submitted. 30 C.F.R. § 250.33(i).

F. Revisions of Approved Plan: 30 C.F.R. § 250.33(n)(2)

Revisions are submitted in the same manner as a new POE, but submit only the information related to the proposed revision of the POE.

If the Director determines that there may be a significant change in impact, then the POE is subject to entire review procedure except consistency requirements of the CZMA.

If the proposal requires additional permits, it may be subject to state CZMA review as well.

The goal is to anticipate and build contingencies into the original POE to avoid necessity for revisions.

VII. Drilling for Oil and Gas: 30 C.F.R. Subpart D, §§ 250.50-68

A. Permit to Drill

Every OCS Lessee must file an application for a permit to drill (APD) a well on MMS Form 331C prior to drilling any well on an OCS lease. 30 C.F.R. § 250.64(a); 30 C.F.R. § 250.34(t). Similar requirements are applicable to most reworking operations on wells located on the OCS. 30 C.F.R. § 250.103. The 1988 revisions to the MMS operating regulations introduced several new requirements prior to MMS approval of an APD, as are noted below.

1. Drilling Unit. Include information on the fitness of the drilling unit for the proposed well operation in the application. 30 C.F.R. § 250.51; 30 C.F.R. § 250.64.
2. The proposed well must also be included in a previously approved POE, Development and Production Plan (DPP), or a Development Operations and Coordination Document (DOCD). 30 C.F.R. § 250.34(t).

APDs are not subject to separate State CZM consistency review. *Id.*

3. Mobile Drilling Units. APDs for wells to be drilled from mobile drilling units require additional environmental and operational supporting data. 30 C.F.R. § 250.64(b).
4. Certain other data and information must accompany all APDs *inter alia* as follows:
 - a. Plat showing surface and subsurface locations of well.
 - b. Design criteria for the well and well control. This includes a contingency plan for moving off of the location in the event of loss of well control. 30 C.F.R. § 250.64 (b)(4).
 - c. Anticipated surface pressures, and the assumptions and calculations used to derive them. 30 C.F.R. § 250.64(f)(2)(vi).

- d. A blow-out preventer (BOP) equipment program, including a schematic drawing of the BOP stack. 30 C.F.R. § 250.64(f)(3)(v).
 - e. Mud, cementing, and casing program, including the casing design safety factors for burst, collapse, and tension. 30 C.F.R. § 250.64(f)(4)(ii).
 - f. Proposed logging program, and specified coring depths. 30 C.F.R. § 250.64(f)(5).
 - g. Directional survey program for directionally-drilled wells.
 - h. A Hydrogen Sulfide Contingency Plan and detection and monitoring equipment. 30 C.F.R. § 250.64(f) and 30 C.F.R. § 250.67(h)(5)(ii).
5. Seafloor Conditions. If the POE or the DPP does not contain sufficient information to ascertain whether the seafloor is capable of supporting the drilling unit, then the District Supervisor may require additional site specific surveys and boring samples. 30 C.F.R. § 250.51(d).
 6. Platforms-Moving in Drilling Unit. The Lessee or operator must shut in, below the surface, all wells in the well bay into which the drilling unit or related equipment is being moved. 30 C.F.R. § 250.51(h).

B. Drilling Operations

Governed by Part 250, Subpart D, which consolidated the requirements contained in former OCS Orders Nos. 2, 5, and 8.

1. General Duty. "The Lessee shall take necessary precautions to keep its wells under control at all times." 30 C.F.R. § 250.50.
2. OCS Orders previously implemented MMS regulations governing OCS operations. They specified practices and procedures to be followed during exploration, production, and development activities in all or in each of the four OCS regions.

- a. **Orders Revoked.** The MMS revoked all OCS Orders when it published its 1988 revised operating regulations. 53 Fed. Reg. at 10,690 (April 1, 1988).
 - b. **Notices to Lessees Still Valid.** The MMS did not similarly revoke all NTLs en toto.
3. **The Occupational Safety and Health Administration (OSHA) Involvement.** Note, that the OSHA is considering publishing regulations for oil and gas well drilling and servicing. 48 Fed. Reg. 57,202 (December 28, 1983). The OSHA planned to reissue a Notice of Proposed Rulemaking in July, 1989. The OSHA stated that since it is difficult to apply existing safety standards to such activities, it intended to publish specific guidelines for the oil and gas industry itself. 54 Fed. Reg. 16,868 (April 24, 1989). To date, no such update has been published.

C. Well Completions

"Well completion operations" are defined as "the work conducted to establish the production of a well after the production casing string has been set, cemented, and pressure tested. 30 C.F.R. § 250.71. Previously, the MMS allowed a single string completion in conjunction with approval of an APD. Subsequent to the 1988 revisions, the MMS requires the Lessee or operator to submit a separate Form MMS-331, Sundry Notices and Reports on Wells for approval, prior to attempting to complete a well. 30 C.F.R. § 250.83(a).

D. Revised Well Operations

Note that any substantial change in drilling plans such as deepening or plugging back a well or changing the equipment as originally approved by the MMS on Form 331C must be reported to the MMS District Supervisor on MMS Form 331 and approved prior to commencement. 30 C.F.R. § 250.65.

E. Well Workover Operations

"Workover Operations" are defined as "the work conducted on wells after the initial completion for the purpose of maintaining or restoring the productivity of a well." 30 C.F.R. § 250.91. A Lessee must file a Form MMS-331, Sundry Notices and Reports on Wells prior to engaging in "workover operations", except for certain activities which

the MMS defines as "routine operations" conducted on wells which already have "Christmas trees" installed. 30 C.F.R. §§ 250.103 and .91.

Workover Operations - Equipment Movement. Similar to drilling operations, the MMS requires a Lessee to shut in all wells in the same well bay to which the workover rig and equipment is being moved. 30 C.F.R. § 250.92.

F. Clean Water Act Restrictions

The EPA has proposed rules which will establish "NSPS and BAT Effluent Limitations Guidelines for Drill Cuttings Waste Streams and Drilling Fluids." 40 C.F.R. Part 435; 53 Fed. Reg. 41,356 (October 21, 1988), as corrected 54 Fed. Reg. 634 (January 9, 1989).

G. Field Drilling Rules: 30 C.F.R. §§ 250.62 and 250.102

The 1988 MMS regulatory revisions contain a unique provision. An MMS District Supervisor may establish local field drilling rules which modify the requirements in Subparts D or F. Whether this provision passes muster under the Administrative Procedure Act requirements will take some time to ascertain. See 53 Fed. Reg. 10,617 (April 1, 1988) for the MMS description of the scope of this provision.

VIII. Discovery of Oil or Gas - Lease Maintenance

A. Determination of Well Producibility: 30 C.F.R. § 250.11

1. The determination is performed at the request of the Lessee. The primary purpose of the test is "to trigger changing the lease from rental to minimum royalty status." 53 Fed. Reg. 10,604 (April 1, 1988).
2. Federal OCS Standard. A well capable of producing in paying quantities will maintain the lease in effect (similar to the onshore Oklahoma standard).
3. "Producibility" can be shown through production tests in all areas of the OCS. In the Gulf of Mexico Region logs, sound log-interpretation techniques, sidewall cores, and formation tests may also be collectively utilized to demonstrate "producibility."
4. The 30 C.F.R. § 250.11 determination allows the Lessee to qualify for a suspension of production under 30 C.F.R. §

250.12. Note: Section 102(d) of the NGPA, "OCS Gas Qualifying for New Natural Gas Ceiling Price," utilizes the 1969 version of OCS Order No. 4 for qualifying wells for gas prices under that subsection. 30 C.F.R. § 250.11 as well as the 1980 version of OCS Order No. 4 contains higher resistivity requirements than the 1969 version thereof.

5. The Lessee must still pay minimum royalty during the period of suspension. *See*, 30 C.F.R. § 218.154.
6. Effect of Suspension. 30 C.F.R. § 256.73. The primary term is extended for a period equal to the length of the suspension. For an OCS lease already in its secondary term, the lease shall not be deemed to have expired as long as the suspension remains in effect.
7. Abandonment of Wells. Note, that the MMS has a unique regulation that requires a Lessee to show that a production well can no longer be profitably produced before the Lessee may abandon the well. 30 C.F.R. § 250.110. See discussion at Section XIII *infra*.

B. Drilling and Well Reworking Operations

1. The Section 3 Term Provision of OCS lease reads as follows: "and so long thereafter as ... drilling or well reworking operations, as approved by Lessor, are conducted thereon."
2. Lease Term Extended. Secondary term of lease is extended by such "operations." 30 C.F.R. § 256.70.
3. Length of Extension. Will maintain lease if conducted no more than 90 days before the expiration of primary term, or within 90 days of the date of last production or drilling or well reworking operations. The regulation is actually vague and subject to varying interpretations. However, a call to two MMS Regional offices confirms that the MMS intends to follow the above procedure. 30 C.F.R. § 250.13(a).

New provision: The Director may approve longer periods of time between drilling and well reworking operations not to exceed 180 days in his discretion, or longer than 180 days on environmental grounds.

Note: This is a handy alternative method to temporarily preserve a lease if the MMS is not willing to consider your request for a full-blown suspension of operations.

4. Forms. MMS Form 330 or 331 under 30 C.F.R. § 250.65 of Notice of Intent to drill or rework a well must be filed.

C. Compensatory Royalties - Former 30 C.F.R. § 250.33(b)

1. Summary. The pre-1988 revised MMS regulations contained the federal government's equivalent of an anti-drainage obligation. The provision was deleted by the 1988 revisions. No similar anti-drainage provision was included, except perhaps for 30 C.F.R. § 250.171(a) which requires a Lessee "to maximize the ultimate recovery" for each well or reservoir on an OCS lease. Now, however, the MMS has proposed to revise 30 C.F.R. § 250.32, Well Location and Spacing, to address the Regional Supervisor's authority to protect the lessor from drainage. 55 Fed. Reg. 8485 (March 8, 1990). The proposal contemplates either that the MMS will order the Lessee to drill a protection well, or that the Lessee will pay the MMS certain compensation in lieu thereof.
2. The previous regulation similarly required Lessee to drill offset wells in order to protect against drainage or pay a compensatory royalty (as determined by the Director) in its stead. The provision was rarely utilized.
3. Such payments are considered equivalent to production. 30 C.F.R. § 256.72. This provision was not deleted by the MMS which raises a question of whether the oversight was accidental or whether a Lessee may still offer to pay to the MMS compensatory royalties rather than to commit to drilling a well in an offset situation.

D. Abandonment of Wells

Subpart G. 30 C.F.R. §§ 250.110-114. See Section XIV *infra* for a discussion of Subpart G.

IX. Development and Production Operations: 30 C.F.R. § 250.34

A. Other Minerals

For rules governing operations on leases for offshore minerals other than sulphur, oil or gas see, 30 C.F.R. Part 282; 54 Fed. Reg. 2058 (January 18, 1989).

B. MMS Approval Required

No such activities may be commenced or conducted, except in accordance with a development and production plan as approved by the MMS Director. 30 C.F.R. § 250.30.

1. The Plan should provide for "development and production of all known accumulation of hydrocarbons found on the leasehold(s) that are capable of production in paying quantities." Former 30 C.F.R. § 250.34(a)(1)(i).
2. Applicability. May be submitted by one Lessee and apply to one or more leases or by a group of Lessees. Previous multi-lease authority required any DPP Plan which affected more than one lease to be submitted pursuant to an approved unitization, pooling or drilling agreement. 30 C.F.R. § 250.30.
3. Western Gulf of Mexico Exception. The DPP Plans are not required for leases in Western Gulf of Mexico. Abbreviated plans known as Development Operations Coordination Document are required in its stead. 30 C.F.R. § 250.34(d)(1).

C. DPP Plan requires description of the following: (It appears from the revised 1988 format that the Lessee is basically "writing" an environmental impact statement for the MMS when it submits a completed DPP)

1. Work to be performed and associated time schedule. 30 C.F.R. § 250.34(a)(1).
2. Description of drilling vessels, pipelines, platforms, or other facilities proposed or known by Lessee, including oil spill containment and cleanup plans. (a)(2).
3. Well and Fixed Structure locations. (b)(1)(i) and (ii).

4. Current interpretations of G&G data, structure maps, and schematic cross sections and depths of productive formations. (b)(1)(iii-v).
5. Shallow hazards analysis and seafloor conditions. (b)(1)(vii).
6. Hydrogen Sulfide Contingency Plan. (b)(2).
7. Environmental safeguards, including an updated Oil Spill Contingency Plan as described in 30 C.F.R. § 250.42. (b)(3).
8. Description of secondary and tertiary recovery practices to be utilized. (b)(5).
9. Information about BAST or unusual technology to be employed. (b)(7).
10. Description of land-based operations to be conducted or contracted for as a result of the proposed operations. (b)(8)(i).
11. Proposed rights-of-way, easements, and transportation operations. (b)(8)(i)(A-C).
12. Drilling fluids and cuttings discharges. May reference EPA National Pollutant Discharge Elimination System (NPDES) Permit information. (b)(8)(ii).
13. Types and quantities of pollution and disposal methods. (b)(8)(iii).
14. Onshore impacts both economic and environmental for all DPP Plans except for the western Gulf of Mexico. (b)(8)(iv).
15. Existing environments, including archaeological resources, aquatic life, environmentally sensitive areas, water-column quality, oceanography, historic weather patterns, and other uses of the area. (b)(8)(v)(A-G).
16. Assessment of cumulative environmental impact, including existing or planned environmental monitoring systems. (b)(8)(v)(H) and (b)(9).
17. Discussion of alternatives to the proposed activities that were considered along with a comparison of the environmental effects. (b)(6).

18. Certificate of coastal zone consistency per 15 C.F.R. Part 930. (b)(11).
19. Air Quality. For each OCS facility (as defined in 30 C.F.R. § 250.2) included within a new DPP Plan certain information necessary to ascertain pursuant to 30 C.F.R. § 250.45 whether that facility significantly affects the onshore air quality for the particular pollutant. (One may assume that the term "pollutant" refers to the four primary types of pollutant referenced in 30 C.F.R. § 250.45(e)).
20. Anticipated or approved suspensions. (b)(13).
21. Individual contact person for Lessee. (b)(15).
22. Previously submitted data and information may be included by reference. 30 C.F.R. § 250.34(c).
23. Limiting contents of Plan. The Regional Director (and not his subordinate the Regional Supervisor) after consultation with National Oceanic and Atmospheric Administration (NOAA), the Governor of an affected State, and the State CZM agency may limit the amount of information that a Lessee must submit pursuant to the above requirements. 30 C.F.R. § 250.34(e).

D. Development Operations Coordination Document: 30 C.F.R. § 250.34(d)(1)

1. DPP plans are not required for leases located in the Western Gulf of Mexico. Instead, an abbreviated plan, called a DOCD, is required, since this region is a mature oil and gas producing region.
2. The specific requirements for a DOCD are not enumerated in the regulations. 30 C.F.R. § 250.34(d)(1). However, the preamble to the regulations makes clear that the MMS primarily seeks information to satisfy the NEPA and the CZMA statutory requirements. 53 Fed. Reg. 10,612 (April 1, 1988).
3. What is an NTL? A NTL or "Notice to Lessees and Operators" is a formal notification within an OCS Area which:
 - a. Provides a clarification or interpretation of an OCS regulation or lease stipulation, or

- b. Requires implementation of a special lease stipulation contained in a lease.

E. Environmental Reports: Former 30 C.F.R. § 250.34-2(a)(3)(i) (1987)

1. See Section VI.B. *supra*. The MMS has eliminated the requirement of a separate environmental report and merged relevant environmental requirements directly into the DPP itself as discussed in greater detail *supra*.
2. States of the Western Gulf that have approved CZMA Plans include Alabama, Mississippi and Louisiana, but not Texas. California and Alaska also have approved CZMA Plans.
3. CZMA Plan preferable to piecemeal state regulation of offshore waters. Look, for example, at recent State of Texas RRC revised rules 30 TAC 2.2 and 9.7 on offshore pollution. Note that the Department of Commerce can also override state consistency objections. *Cf.* California's use of the CZMA in a method to obstruct offshore oil & gas development.

F. Submittal of D&P/DOCD Plans: 30 C.F.R. § 250.34-2(a)(6)

1. The Plan is not deemed submitted until the Director has determined the Plan is complete (within 20 working days of filing).
2. A copy of the DPP/DOCD Plan is then sent to affected states within five working days after the Plan is "deemed submitted".
3. The state has 60 days from the date of receipt of the Plan to submit comments and recommendations to the Regional Supervisor.
4. At this point, review of a DPP/DOCD Plan differs from review of a Plan of Exploration.
5. The MMS Director *must* accept recommendations of the Governor of the affected state for DPP/DOCD if the Director determines that the recommendations "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state." 30 C.F.R. § 250.34(h) (little used provision).

6. The Plan is then processed in accordance with federal CZM consistency procedures. 15 C.F.R. Part 930.

G. Approval/Disapproval of DPP/DOCD Plan and Modifications Thereof: 30 C.F.R. § 250.34(l)

1. Regional Supervisor may disapprove Plan on the following bases: Lack of State CZMA consistency certification; national security; exceptional geologic conditions or resource values in the marine or coastal environment; and implementation would probably cause "serious harm or damage." See 30 C.F.R. § 250.34(l)(iv).
2. The Regional Supervisor must notify the Lessee in writing of disapproval. The Lessee may resubmit a modified Plan for approval. Only information related to the proposed modifications needs be submitted. 30 C.F.R. §§ 250.34(m) and (n).

X. Minimum Training Requirements - Oil & Gas Personnel: 30 C.F.R. Subpart O, Part 250

A. Summary of Safety Training Requirements

The MMS recently proposed comprehensive revised safety training requirements for personnel engaged in OCS drilling and production as well as well completion and workover operations. 54 Fed. Reg. 31,768 (August 1, 1989). The proposed revisions are actually a continuation of a process begun by a March 18, 1986 notice of proposed rulemaking (NOPR) previously issued by the MMS.

After publishing the March 1986 NOPR, the MMS issued an "interim" final Subpart O which consolidated the previously existing training requirements with minor revisions. 53 Fed. Reg. 10,776 (April 1, 1989), as amended by 53 Fed. Reg. 27,853 (July 25, 1988).

However, in the March 1986 NOPR the MMS posited to the public a number of questions related to training and offshore operations in an effort to gather data thereon. The August 1989 NOPR proposal revises, and modernizes the April 1988 final regulations. The extent of the proposed revisions are reflected in the fact that the current regulations when published occupied about 3/4 of a page in the Federal Register, while the proposed revisions occupy over 10 pages.

Currently the MMS tentatively plans to finalize the proposed revisions in late Spring 1990. 54 Fed. Reg. 44,782 (October 30, 1989).

Note, that well work, drilling, and production safety system requirements are only part of the training requirements which the MMS has established. Subsections D through O below will consider some additional instruction which is necessary prior to conducting various operations on the OCS.

Note too, that the U.S. Coast Guard requires personnel stationed offshore to receive training in the emergency evacuation of offshore facilities and self-propelled vessels.

Finally, the DOT has promulgated emergency training procedures for employees who work on offshore pipelines. 49 C.F.R. § 195.403.

B. Current Training Requirements - General

The current regulations contain neither any general training standards or requirements, nor any specific regulatory requirements for well completion and well workover operations. Instead, they simply refer to standards contained in one MMS publication, MMS-OCS-T-1, and one American Petroleum Institute manual entitled API RP T-2.

C. Proposed Training Requirements - General: 30 C.F.R. § 250.210

The proposed regulations establish a general training performance standard, personnel training requirements, rules for record retention, and modestly vary from current drilling and production safety system standards. *Id.* The proposed regulations also establish guidelines for well completion and well workover operations. 30 C.F.R. § 250.213.

1. Generic Performance Standard. Employees of OCS Lessees and third-party contractors "engaged in drilling, well-completion, well-workover, or production operations in the OCS shall be trained in the proper operation of equipment, methods of operation, and techniques to avoid hazards to people and property and to prevent pollution of the environment." 30 C.F.R. § 250.210(a).

The proposed standard raises two issues. First, are OCS Lessees responsible for training personnel of third-party contractors under the above rule? The answer is a qualified "no." The response to question 8 in the preamble to the proposed regulations states that "Lessees are responsible for

training their employees . . . as well as hiring contractors whose employees are trained and qualified." 54 Fed. Reg. 31,770 (August 1, 1989). Realistically the OCS Lessee may find itself providing certain onsite drills, etc., for employees of third-party contractors. This raises the second issue - liability for accidents caused by improperly trained employees of third party contractors.

At a minimum, contracts with offshore contractors should allocate liability both for third-party employees who are improperly trained by the contractor itself, and for third-party employees who have participated in the drills conducted by the OCS Lessee itself. Of course, the OCS Lessee may help destroy the traditional independent contractor defense vis-a-vis the third-party contractor by allowing its employees to participate in the Lessee's safety drills. This issue should be addressed in the contract between the parties.

Emergencies. The U.S. Coast Guard regulations establish an ancillary but related duty for OCS personnel during emergencies: "The owner . . . or person in charge shall assign to each person on a manned facility special duties and duty stations so that in event an emergency arises . . . no delay will occur with respect to the use or application of equipment required by [the U.S. Coast Guard]." 33 C.F.R. § 146.115(a).

Those duties include *inter alia*, closing of airports and watertight doors, stopping ventilation systems, donning life preservers, and launching lifeboats. 33 C.F.R. § 146.115(b).

2. Personnel Training Requirements. 30 C.F.R. § 250.210(b). The MMS proposes to maintain only two broad job classifications, that of supervisor and floorhand in each of the three categories of operations, i.e., drilling operations, well workover and completion operations, and production safety system maintenance. *See, e.g.*, chart at 54 Fed. Reg. 31,779, and 31,780 (August 1, 1989). This classification is designed to ensure that training of personnel is based on a functional rather than a job title approach.
 - a. Temporary Relief Workers. Temporary workers must complete the same training courses as full-time workers or work under direct onsite supervision of such a full-time worker. 30 C.F.R. § 250.210(d).

- b. Snubbing, Coil-Tubing, and Small-Tubing Operations Crews. Note also that the proposed regulations require at least one member of the above crews also to take basic and refresher courses in well completion and well workover operations. 54 Fed. Reg. 31,779 (August 1, 1989).
- 3. Frequency of Training - Basic or Advanced Course. 30 C.F.R. § 250.210(f)(1). Comprehensive basic or advanced well control and production safety system courses must be completed every four years. Such time is measured from completion of the previous course.
- 4. Frequency of Training - Refresher Courses. 30 C.F.R. § 250.210(f)(2-4). Well control refresher courses must be completed on an annual basis, while production safety system refresher courses must be completed every two years. Note: the MMS cosponsored an extensive well control symposium/workshop with Louisiana State University on November 28-29, 1989 in Baton Rouge, Louisiana. See 54 Fed. Reg. 46,477 (Nov. 3, 1989) for a detailed agenda.
- 5. MMS Approval of Training Programs/Validity of Prior Training. 30 C.F.R. § 250.211. The MMS proposes to establish detailed requirements which all training programs must meet. Note, however, that any personnel trained under well control programs previously in effect prior to finalization of these regulations will be considered certified in his/her particular well control expertise until the employee is required under the new MMS approved program to take a refresher or the revised comprehensive course. 30 C.F.R. § 250.211(b)(1). This is because the MMS, in the proposed regulations, did not vary the previous requirements contained in the MMS publication MMS-OCS-T-1.

The requirements for well completion and well workover are new. For this reason both floorhands and supervisors must meet the training requirements only, within two years of the effective date of the regulations. 30 C.F.R. §§ 250.213(a) and (c).

In addition, the MMS proposes a third effective date for production safety system training. 30 C.F.R. § 250.214(a). The reference to courses completed after May 31, 1988, appears a bit apocryphal in that all personnel engaged in production

operations must comply with the new requirements within two years after the effective date of the proposed regulations.

D. MMS-Approved Well Control Training Schools

See 54 Fed. Reg. 39,479 (September 26, 1989) for a current list of schools that are qualified to provide "Training and Qualifications of Personnel in Well-Control Equipment and Techniques for Drilling on Offshore Locations."

E. Pollution Control Training and Drills: 30 C.F.R. § 250.43

As previously noted, the MMS requires each Lessee to appoint an oil spill response team. 30 C.F.R. § 250.42(g). The supervisor(s) and team members must participate at least annually in "hands-on" training classes in the deployment and operation of pollution control equipment to which they are assigned. Additionally, the supervisor(s) must be familiar with the deployment and use of all response equipment. 30 C.F.R. § 250.43(a).

The drills may be conducted by the Lessee or a third party, so long as all of the Lessee's personnel identified as members of the oil spill response team participate. 30 C.F.R. § 250.43(b).

Additionally, the MMS conducts seminars on oil spill response. Topics addressed include general response requirements, mechanical containment and cleanup, chemical treating agents, and burning oil on the ocean surface. *See, e.g.*, 54 Fed. Reg. 46,478 (November 6, 1989).

F. Crane Operation: 30 C.F.R. § 250.51(g)

Crane operators on offshore platforms must possess the qualifications contained in the American Petroleum Institute Recommended Practice for Operation and Maintenance of Offshore Cranes (API RP 2D). *Id.*

G. Welding and Burning: 30 C.F.R. § 250.52(b)

Each Lessee must submit to the appropriate District Supervisor a "Welding, Burning, and Hot Tapping Safe Practices and Procedures Plan." Such plan must include qualification standards and training requirements for all personnel who will conduct welding, burning, and hot tapping operations. *Id.*

H. Hydrogen Sulfide Training: 30 C.F.R. § 250.67(h)(2)

All Lessees must establish an onsite training program for *all* personnel, including employees, third-party contractors, and temporary replacements. The program shall familiarize the personnel with the dangers of H₂S and with the provisions of the H₂S Contingency Plan required under 30 C.F.R. § 250.67(h)(1).

I. Garbage Management and Training: 33 C.F.R. § 151.57

While not a training requirement *per se*, the U.S. Coast Guard regulations which implement Annex V of MARPOL 73/78 (*see* Section XII.K. *supra*) state that the Waste Management Plans which are required thereunder are to provide a basis for training in garbage management on ships and offshore facilities. 55 Fed. Reg. 18,580 (May 2, 1990).

J. HASWAPR Emergency Response Training

OSHA's new worker protection standards require that workers utilized in emergency response and post-emergency response (i.e., cleanup) receive training on the hazards associated with the material being cleaned up. These standards apply to oil spills. 29 C.F.R. § 1910.120.

K. Blowout Preventer (BOP) System Drills: 30 C.F.R. §§ 250.86 and 106(c)

All personnel engaged in well completion or workover operations must participate in a weekly BOP drill in order to familiarize the crew with applicable safety measures. The MMS has proposed to revise and bolster requirements related to reporting the results of any such test or drill. 55 Fed. Reg. 18,640 (May 3, 1990).

L. Training in Well Control: 30 C.F.R. § 250.68

Note, that the MMS included the above regulatory section in its table of contents to its revised operating regulations. 53 Fed. Reg. 10,690 (April 1, 1988). However, no such section exists. Also, the available MMS materials do not indicate whether such a regulation is in the planning stage. Given 30 C.F.R. Subpart O, any such regulation would appear redundant.

M. Manned OCS Facilities - Emergency Drills: 33 C.F.R. § 146.125

The U.S. Coast Guard requires each manned OCS facility to conduct an emergency evacuation drill monthly and maintain records of the drill. The drills are to be conducted as if an actual emergency exists. *Id.*

N. Offshore Pipelines

The DOT requires each pipeline system operator to prepare a manual which contains emergency procedures and to train its personnel in implementing those emergency procedures. 49 C.F.R. Subpart 195.

O. Self-Propelled Vessels - Lifesaving Equipment and Training Requirements: 46 C.F.R. Parts 35 and 109

The U.S. Coast Guard recently consolidated and published fire and emergency training requirements for all self-propelled vehicles. *Id.*

XI. Rates of Production: 30 C.F.R. Subpart K, §§ 250.170-177

A. Summary

Subpart K addresses classification of reservoirs, establishment of well and reservoir production rates, flaring and venting of gas, downhole commingling, and enhanced recovery operations. The 1988 MMS revisions consolidated former 30 C.F.R. §§ 250.16, 39, 55, 68, and OCS Order No. 11, Gulf of Mexico and Pacific OCS Regions. The revisions contain various subtle modifications to the rules which previously were in effect. The effect of some of those revisions is unclear, especially for reservoirs requiring Maximum Efficient Rates of Production (MERs) for downhole commingling of well production in potentially competitive reservoirs, and for the newly mandated secondary and tertiary recovery operations.

B. General Rule

"Wells and reservoirs shall be produced at rates that . . . maximize the ultimate recovery without adversely affecting correlative rights." 30 C.F.R. § 250.171(a). Also the Lessee must propose a classification for each reservoir as an oil reservoir, an oil reservoir with a gas cap, or a gas reservoir, and whether the reservoir is rate sensitive or nonsensitive. 30 C.F.R. § 250.171(d).

C. MMS Notification

Section 102(b)(3) of Federal Oil and Gas Royalty Management Act (FOGRMA) requires an operator of an OCS lease to notify the MMS within five business days of a well's commencement of, or resumption of production if the well has not produced for more than 90 days. 30 U.S.C. § 1712(b)(3) (1988).

D. MERs and MPRs

The MMS did away with the requirement to submit a MER for most reservoirs. 30 C.F.R. § 250.172(a). However, each individual well completion still requires calculation of a Maximum Production Rate (MPR). 30 C.F.R. § 250.172(b).

1. The Lessee initially proposes classification of reservoir as rate sensitive or non-rate sensitive to withdrawal of oil or gas. 30 C.F.R. § 250.171(c).
2. The MMS only requires oil reservoirs with an associated gas cap initially to be classified as "sensitive." 30 C.F.R. § 250.171(d). "Sensitive" reservoirs require the establishment of an MER and submittal of Form MMS-1866. 30 C.F.R. § 250.171(a)(1).
3. It appears that *any* party may petition MMS to reclassify any reservoir. 30 C.F.R. § 250.171(e).
4. The MMS actually considers certain gas reservoirs sensitive to low rates of production. *See* comment at 53 Fed. Reg. 10,668 (April 1, 1988). Thus, one cannot easily argue physical waste or even correlative rights issues in competitive reservoir or unitization hearings concerning such type gas reservoirs. *See* Section XIII generally.

E. MERs - Sensitive Reservoirs Only

MERs are established reservoir-wide. 30 C.F.R. § 250.171(a).

Lessee may not produce reservoir in excess of MER. If the Lessee produces in excess of its MER, the Lessee must balance production. Two successive calendar quarters of overproduction result in shutting in of the reservoir until the reservoir is once again in balance. However, the Lessee may petition the Regional Supervisor for an alternative plan to a complete shutting-in of the overproduced

reservoir, e.g., to prevent a loss of lease. 30 C.F.R. §§ 250.171(a)(4-5).

F. MPRs - All Well Completions and Recompletions: 30 C.F.R. § 250.172(b)

1. MPRs are established on a well-test basis. Oil wells must be tested every three months and gas wells tested every six months, with the results submitted to the MMS on Forms MMS-1869 and 1870 respectively. 30 C.F.R. § 250.172(b)(2).
2. The initial MPR may not exceed 110 percent of the well-test rate. *Id.* MPRs may not be exceeded except that temporary fluctuations in excess of the MPR are permissible. 30 C.F.R. §§ 250.172(b)(7) and (c).
3. Failure to submit a well-test results in automatic cancellation of an MPR at the end of the current period. 30 C.F.R. § 250.172(b)(5).
4. However, the Lessee may produce new, reworked, or recompleted intervals for rates necessary to establish an MPR. 30 C.F.R. § 250.172(b)(2).

G. Well Tests: 30 C.F.R. § 250.173

Without prior MMS approval for revised time periods, a Lessee must flow a well for six hours prior to conducting a well production test. The test itself must then be at least four hours long and may be witnessed by the MMS.

H. Bottomhole Pressure Surveys (BHP): 30 C.F.R. § 250.174

BHP Surveys are required for each new reservoir, and annually on any producing reservoir with three or more producing completions.

I. Flaring and Venting of Natural Gas: 30 C.F.R. § 250.175

Authority. Gas may not be either flared or vented without prior approval of the Regional Supervisor except as follows. 43 U.S.C. § 1334(i). Also records of any such releases must be maintained for at least two years at the Lessee's local field office. 30 C.F.R. § 250.175(c).

The exceptions:

1. "Small volumes" from storage or low-pressure production vessels.
2. Equipment failures - Oil-well gas: Without prior MMS approval, up to 48 hours if no air quality problems exist, or 144 cumulative hours in one month. Gas-well gas: Without prior MMS approval, for a length of time necessary to alleviate any temporary emergency.
3. Unloading, cleaning, or testing a well: Unless otherwise specified by the MMS, such operations not to exceed 48 hours.
4. Oil-well gas may not be flared or vented for over one year unless the Lessee submits evidence that it is uneconomic to produce the gas, or the Lessee has begun action to terminate the loss of gas.

J. Downhole Commingling: 30 C.F.R. § 250.176

A Lessee must submit an application to Regional Supervisor prior to actual commingling (an unwritten MMS requirement although the regulation is silent on that point).

Competitive reservoirs and downhole commingling. Note, that for a competitive reservoir, notice of the application must be sent to interested adjacent Lessees. It is unclear however whether such notices must be sent to Lessees in reservoirs already determined to be competitive by the MMS or to Lessees in reservoirs which fall within the 30 C.F.R. § 250.2 definition of a "competitive reservoir." If one sends such a notice, may that notice be used in a subsequent hearing as proof that you acquiesce in the fact that the reservoir is actually "competitive" in the context of a 30 C.F.R. § 250.191 determination?

K. Secondary and Tertiary Recovery Operations: 30 C.F.R. § 250.177

The MMS now requires that Lessees initiate enhanced recovery operations where economically and technically feasible. This is one of the most significant 1988 revisions to the MMS OCS operating regulations. In combination with the newly restrictive rules for abandonment of individual wells, contained at 30 C.F.R. § 250.110-111 (rules which local MMS District Supervisors may have significant leeway to apply; *see* the Preamble to Article XII *infra*), the regulations may impede efficient capital allocation for offshore operators. That

is, a Lessee may be required to continue operations which are marginally profitable and which continue to produce a royalty stream for the federal government, but which tie up capital or other resources which could better be employed elsewhere. The requirement should at least make smaller operators consider drafting some escape language, for example, before entering into a unitization agreement. For the pitfalls and dangers of such a requirement, especially in the context of unitized operations, see Fant, *Legal Issues in Implementing Secondary and Tertiary Recovery Operations on Federal Oil and Gas Leases*, Land and Water Law Review, March 1984. See also, Anderson, *Mutiny: The Revolt Against Unsuccessful Unit Operations*, 30 Rocky Mtn. Min. L. Inst. 13-1 (1984) for additional considerations for minority interest holders concerned about the opposite problem, i.e., nondevelopment in compulsory units in the onshore arena, some ideas of which may be applicable to OCS units.

L. Site Security Requirements: 30 C.F.R. § 250.183 and 40 C.F.R. § 112.7(e)(9)

The MMS requires the Lessee or operator (the language in 30 C.F.R. § 250.183 is unclear) to operate and maintain measurement related equipment so as to ensure that no theft of production occurs and accurate measurement for royalty purposes is established. 30 C.F.R. § 250.183. See, subsections 183(a) and (b) for the specific current and proposed requirements for protection of liquids and gas production for meters, valves, samplers, bypasses, and tanks. 55 Fed. Reg. 8485 (March 8, 1990). See also, 40 C.F.R. § 112.7(e)(9) for general EPA valve locking and lighting requirements for storage facilities other than oil production facilities.

XII. Operating, Safety and Environmental Regulations Applicable to Offshore Structures, Drilling Units, and Vessels

Preamble. The MMS is the primary governing agency offshore in the areas of operating, safety, and environmental regulations. The U.S. Coast Guard, DOT of course handles most maritime issues including drilling vessels, and also has a major and increasing role in offshore oil & gas safety issues on all OCS facilities. 43 U.S.C. § 1333(d) (1988). The specific jurisdictional authority of each agency was clarified when the two agencies entered into an August 29, 1989 MOU. The MOU supersedes a similar but less extensive December 18, 1980, document. 54 Fed. Reg. 39,820 (September 28, 1989).

The U.S. Coast Guard/MMS MOU clarifies technical review and administrative jurisdiction in three broad areas: offshore facility and vessel

design and construction requirements; systems and equipment; and operations.

In design and construction, the MMS exercises technical review of and approval of design, fabrication, structural integrity, location, modification and repair, and installation of all OCS production facilities. Additionally, the MMS verifies site conditions for all OCS facilities, including mooring systems.

The U.S. Coast Guard, on the other hand, exercises technical review of and approval of design and construction of OCS drilling facilities, vessels engaged in OCS activities, and other facilities which are required to possess a U.S. Coast Guard Certificate of Inspection (COI) or a U.S. Coast Guard Letter of Compliance (LOC). 33 C.F.R. § 143.100 Additionally, the U.S. Coast Guard establishes requirements for structural integrity, stability and buoyancy, and general arrangement on all OCS drilling facilities except gravel or ice islands and caisson-retained islands.

The U.S. Coast Guard also now assumes the primary role for non-production related safety issues on all OCS facilities. Its responsibilities include structural fire protection, workplace safety, evacuation procedures, and lifesaving equipment.

In the area of systems and equipment, the MMS will continue to establish requirements for drilling, completion, production, well control, and workovers on all OCS facilities. See Subsection IV(B) of the MOU for a complete list of these systems.

As expected, the U.S. Coast Guard establishes systems and equipment requirements generally for vessels used in OCS operations, including drilling and tank vessels under the MOU, the Port and Tanker Safety Act of 1978, 33 U.S.C. §§ 1221-1232, as recodified, and under the MARPOL Protocol of 1978 as implemented by the U.S. Congress. The U.S. Coast Guard also establishes rules for lifesaving, personnel safety, and occupational safety and health hazards on all OCS facilities. However, any such requirements may not conflict with the MMS's requirements for drilling, production, or workover equipment. Subsection IV(B)(2) of the MOU.

In the operational arena, the MMS administers training, drills, inspections, and emergency procedures that relate to most offshore activities, including drilling, production, workover, welding, gathering lines, and well-head and platform removal.

General U.S. Coast Guard jurisdiction over operations on OCS facilities is limited, being confined primarily to the following activities: emergency evacuation; handling, transfer and stowage of explosive, radioactive,

flammable (other than produced hydrocarbons), and other hazardous materials; vessel-to-vessel transfer of petroleum products; vehicle and vessel operations; occupational safety and health of personnel; diving operations; and pollution response and compensation.

Finally, in implementing the MOU, the MMS and the U.S. Coast Guard will share both data and personnel as necessary to fulfill their statutory obligations. *See* Sections VIII and XIV of the MOU. Thus, visits to OCS facilities by employees of either agency will need to be treated with equal respect even though the particular inspector does not have the authority under the MOU to cite a Lessee for non-compliance with the requirements of the opposing agency.

It should also be noted that the OSHA has some jurisdiction over health and safety standards for employment performed on the OCS. 29 U.S.C. § 653(a). In fact, the OCSLA, as amended, acknowledges that, stating: "[n]othing in this Act shall affect the authority provided by law to the Secretary of Labor for the protection of occupational safety and health" 43 U.S.C. § 1347(d) (1988). Whether OSHA exercises concurrent jurisdiction over safety and health issues or whether it merely exercises jurisdiction in lieu of any applicable MMS or U.S. Coast Guard pronouncement pursuant to section 21(d) of the OCSLA, as amended, is currently a moot issue as the OSHA has made little effort to date to involve itself in issues affecting employees working on the OCS. (The OSHA published a Notice of Proposed Rulemaking on December 28, 1983 relating to safety standards for oil and gas well drilling and servicing. 49 Fed. Reg. 57,202 ; 29 C.F.R. § 1910.270. Little action has taken place since.) One should nonetheless be aware that the OSHA may have concurrent authority to regulate employee health and safety standards on the OCS, but to date has chosen to leave that field subject to the MMS and the U.S. Coast Guard scrutiny.

The MMS also currently administers the NPDES offshore discharge policy under a May 31, 1984 MOU between the EPA and the DOI and will likely continue to do so.

The MMS directly regulates air emissions from OCS structures and facilities, subject potentially to state review under the CZMA. Note, however, that Congress is also considering shifting current MMS control over offshore air emissions to the EPA under the Clean Air Act.

In August 1985, the EPA proposed National Effluent Limitation Guidelines for Offshore Oil & Gas Operations. 50 Fed. Reg. 34,592 (August 26, 1985); 55 Fed. Reg. 16,842 (April 23, 1990). To date no rule has been promulgated. The EPA, however, seeks to repropose the rule in late 1990, to be finalized in mid-1992. *Id.* Two issues of particular concern to OCS Lessees relate to

produced water discharges. Will overboard produced water discharges be partially or completely banned? Also assuming that discharges continue to be allowed, will it be permissible to transport produced water from a no discharge area to an area where discharges will be allowed? Currently, of course, produced water discharges are either authorized pursuant to the terms of general NPDES permits issued for particular oil and gas producing regions, or pursuant to individual permits, as more fully discussed in this Section.

In the area of solid waste disposal, however, the EPA still directly issues and administers permits for ocean dumping of wastes, including hazardous wastes. 40 C.F.R. Part 228. Finally, the Army Corps of Engineers (COE) issues permits both for placement of structures in navigable waters of the U.S. and for disposal of dredged materials offshore. 43 U.S.C. § 1333(e).

Another unique regulatory twist is that the MMS has given each District Supervisor the power to issue field drilling rules which may alter the otherwise applicable regulations contained in Subparts D "Drilling Operations," 30 C.F.R. § 250.62; Subpart E "Well-Completion Operations," 30 C.F.R. § 250.82; Subpart F "Well-Workover Operations," 30 C.F.R. § 250.102; and possibly even Subpart G "Abandonment of Wells," 30 C.F.R. § 250.110. The District Supervisor's power under Subpart G has already come into question in the Gulf of Mexico region. Generally, a Lessee, in abandoning a well on the OCS, may use a wireline or snubbing unit to place cement down a wellbore and abandon a well. However, certain District Supervisors have been threatening to require a standard drilling rig to conduct abandonment operations, since a standard drilling rig has the capability to pull tubing from a well, while a wireline or snubbing unit does not. The day rates between the types of rigs vary greatly. Thus, the choice of rig can significantly affect the total cost of abandoning a well on the OCS.

This is a simple but significant example of how the new regulatory power of the individual District Supervisors may affect operations.

Finally, one should note that the DOT administers pipeline safety issues. That subject is more fully discussed in Article XVI *infra*.

Along with the aforementioned MMS District Supervisor regulatory wildcard, the specific statutes and rules implementing the threads of the above regulatory format are clarified below.

A. Army Corps of Engineers and Offshore Structures

Under Section 10 of the Rivers and Harbors Act of 1899, the COE issues permits which authorize the placement of structures in or work in or affecting navigable waters of the United States. 33 U.S.C. § 403.

Such permits are required for the construction of artificial islands and fixed structures on the OCS. 33 C.F.R. § 322.3(b). *See* 33 C.F.R. Parts 322 and 325 for permit requirements.

Note, that the COE only reviews the navigational and national security aspects of a permit request, and leaves the review of the environmental aspects of the request to the MMS. 33 C.F.R. § 322.5(f).

B. Offshore Structures, Operating Requirements - BAST Standards: 43 U.S.C. § 1347(b)

The relevant statutory authority reads as follows: The Secretaries of Interior and State (U.S. Coast Guard) "shall require, on all new drilling and production operations and, whenever practicable, on existing operations the use of the BAST which the Secretary (of Interior) determines to be economically feasible, whenever the failure of equipment would have a significant effect on safety, health, or the environment" *See also* 30 C.F.R. § 250.22. Next, "[t]he Secretary of the Department in which the U.S. Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment and other matters relating to the promotion of safety of life and property on artificial islands, installations . . . or on waters adjacent thereto as he may deem necessary." 43 U.S.C. § 1333(d)(1).

1. Platforms and Structures - Design and Structure. 30 C.F.R. § 250.130-144.
 - a. Summary. The 1988 regulatory revisions basically codified former OCS Order No. 8 into the regulations in Subpart I. Subpart I with the exception of 30 C.F.R. § 250.142 governs all structural aspects of offshore facilities, including foundations, design, installation, maintenance, modifications and repairs. Subsection 250.142 establishes requirements for periodic Lessee inspection and maintenance of platforms and structures.

- b. Application Requirement. All new platforms and all major modifications to existing platforms; A Lessee must submit an application for approval to the Regional Supervisor. 30 C.F.R. § 250.131. The application may be submitted with or subsequent to the submittal of a POE, DPP, or DOCD. 30 C.F.R. § 250.131(c).

The term "platform" includes single-well caissons, tripods, artificial islands, etc. 30 C.F.R. § 250.130(b).

- c. OCS Platform Verification Program - Originally an October 1979 document, its requirements have been retained in the revised regulations. 30 C.F.R. § 250.132. The Lessee must nominate a third party certified inspector to be approved by the MMS. The inspector then reviews the design, fabrication, and installation of any platform in order to insure that the Subpart requirements are met.

Modifications. The CVA nominated by the Lessee and approved by the MMS also monitors design, fabrication and installation phases of major modifications of existing platforms which meet any of the conditions contained in subsection 250.130(c). 30 C.F.R. § 250.133.

2. The MMS and U.S. Coast Guard Platform Design Requirements.

- a. The MMS Platform Design Requirements. Depending upon the type of platform selected to be constructed by the Lessee, certain MMS and U.S. Coast Guard design standards must be met. Those include environmental factors such as wave and bottom conditions, snow and ice, and active local faults; load and foundation requirements; fatigue assessments; and finally the effect of the transportation and installation operations upon the structural integrity of the platform. See 30 C.F.R. § 250.134-141 and August 29, 1989 MMS/U.S. Coast Guard MOU.
- b. U.S. Coast Guard Platform Design Requirements. As noted under the August 29, 1989, MOU the U.S. Coast Guard assumed primary jurisdiction over non-production system related safety issues including structural fire protection. That includes design and

location of fire escape routes, personnel landings, and guards and rails. 43 C.F.R. § 143.100

3. Specific System Design Requirements.

- a. The MMS. For fixed offshore facilities, most systems are designed to American Petroleum Institute (API) standards, in accordance with the MMS requirements. 30 C.F.R. § 250.1(d). See API Design Standard Bulletins RP 2A, *Recommended Practice for Planning, Designing, and Constructing Fixed Offshore Platforms*; RP 14F, *Recommended Practice for Design and Installation of Electrical Systems for Offshore Production and Installation of Electrical Systems for Offshore Production Platforms* (July 1985); RP14C, *Recommended Practice for Analysis, Design, Installation, and Testing of Basic Surface Safety Systems on Offshore Production Platforms*, 4th ed. (Sept. 1986); and RP 500 B, *Recommended Practice for Classification of Areas for Electrical Installations at Drilling Rigs and Production Facilities on Land and on Marine Fixed and Mobile Platforms*, 2d ed. (July 1973).

The specific systems governed by the MMS requirements include production safety systems, wellhead and well-bay systems, production pressure vessels, production electrical design, hazardous area classification, drilling rig, hydrocarbon vent systems, pollution prevention, fire/gas detection systems, and deck cranes.

- b. U.S. Coast Guard. Under the 1989 MMS/U.S. Coast Guard MOU, the MMS reviews drilling systems, while the U.S. Coast Guard reviews marine systems and safety systems that are directly tied to the drilling system, as well as any items which are certified by the U.S. Coast Guard under a vessel Certificate of Inspection (i.e., all aspects of waterborne safety on floating vessels).

Specific systems subject to U.S. Coast Guard regulation include non-production system pressure vessels, electrical fire detection, control and extinguishing systems on drilling facilities, and the installation and type of fire detection equipment used for drilling and production systems.

- c. Overlapping Jurisdiction. In selecting and designing the above platform systems, careful selection of interface points between U.S. Coast Guard marine and MMS industrial systems can significantly affect the total cost of a particular facility. For example, in electrical cabling, the MMS API specifications authorize electrical wiring within conduits in the deck areas, while the U.S. Coast Guard regulations require marine armored cable for primary power applications. Another area is the U.S. Coast Guard's very specific requirements for fabrication, testing, and certification of pressure vessels. Thus classifying a pressure vessel as "production" or "non-production" will greatly affect the cost of the final production.
- 4. Tension Leg Platforms. Tension Leg Platforms (TLP) constitute a hybrid type of facility, part vessel, part fixed structure. The TLP is a production platform which is moored to the seabed, but which depends on floating vessel characteristics for operation.

As such, application of proper MMS/U.S. Coast Guard design requirements to particular systems is not always clear. This can be important in that U.S. Coast Guard "marine and safety" system requirements usually are more stringent than MMS "industrial" system requirements.

For an excellent discussion of the jurisdictional and technical issues, see Praught M., Morris J., and Athanasiadis S., *Regulatory Considerations in the Design of Tension-Leg Platforms*, Society Journal of Petroleum Technology 764 (June 1990).

- 5. NTL 85-8 - Minimizing Oil and Gas Structures in the Gulf of Mexico. Issued November 26, 1985.

Portions of MMS NTLs were consolidated into the 1988 revised operating regulations. However, unlike OCS Orders, the MMS did not specifically revoke all extant NTLs. 53 Fed Reg 10,596 (April 1, 1988). To the extent not inconsistent with current regulations, certain pre-April 1988 NTLs may still have some force and effect.

The MMS states that Subpart G supersedes NTL 85-8 53 Fed. Reg. 10,650 (April 1, 1988). However, Subpart G sets no specific rules or time limits for such minimization.

6. Material Standards. The U.S. Coast Guard also published an Advanced Notice of Proposed Rulemaking which intends to modernize material standards for fixed platforms. 50 Fed. Reg. 9290 (March 7, 1985).

C. Location of Offshore Platforms and Structures

1. The Secretary of the Army through the COE is required to prevent obstruction to navigation in the navigable waters of the United States, including any caused by OCS oil and gas operations. 43 U.S.C. § 1333(e).
 - a. Shipping Fairways. "The Department of the Army will grant no permits for the erection of structures (in the Gulf of Mexico) in the area designated as fairways . . ." 33 C.F.R. § 209.135(a).
 - b. Anchorage Areas. "The Department of the Army may grant permits for the erection of structures within an area designated as an anchorage area" subject to certain spacing restrictions. 33 C.F.R. § 209.135(c).
 - c. Processing Department of the Army Permit Applications. 33 C.F.R. Parts 322, 325, and 327. Note that permit applications are submitted to the COE. Moreover, the COE requires pre-application consultation with the relevant District Engineer on all major applications. 33 C.F.R. § 325.1(b). Review by both the COE and the shipping industry may last up to six months. 33 C.F.R. § 325.2.
2. Locating Port Access Routes, Shipping Fairways, and Offshore Oil and Gas Structures. The U.S. Coast Guard has the general obligation of establishing port access routes, shipping fairways, and to reconcile potential conflict between OCS oil, gas and mineral development and navigation, thereby indirectly regulating facilities located in offshore territorial waters. 33 U.S.C. §§ 1223, 24; 33 C.F.R. Parts 166, 167.
 - a. Safety Zones. The U.S. Coast Guard establishes a safety zone for maritime navigational purposes around

each OCS platform. 33 C.F.R. Part 147. See, 54 Fed. Reg. 46,230 (Nov.2, 1989) and 54 Fed. Reg. 48,741 (Nov. 27, 1989) for an example of a safety zone which was established around platform Heritage in the Santa Barbara Channel.

- b. Areas to be avoided. The U.S. Coast Guard also submits proposed "Areas to be Avoided" to the International Maritime Organization (IMO) Subcommittee on Safety of Navigation for approval. If adopted by the full IMO Maritime Safety Committee, then certain size or types of vessels will be prohibited from entering that area. Although ostensibly utilized for navigational purposes, the proposals often are intended to protect other marine resources. See, 55 Fed. Reg. 19,418 (May 9, 1990) for a U.S. Coast Guard proposal to protect coral reefs in the Florida Keys.
3. Procedure. Subject to any limitations imposed by the COE and the U.S. Coast Guard, the MMS approves the location of an on-lease platform or structure pursuant to an Exploration or Development and Production Plan. 30 C.F.R. § 250.34(a)(2) and 30 C.F.R. §§ 250.130-141.

D. Personnel on OCS Facilities: 33 C.F.R. Subpart 141

Be advised that only citizens of the United States or resident aliens may be employed on OCS facilities. 33 C.F.R. § 141.15

E. Emergency Evacuation Plans for Manned OCS Facilities. 33 C.F.R. Parts 140, 143, and 146, 54 Fed. Reg. 21,566 (May 18,1989)

1. Summary. The U.S. Coast Guard requires all manned OCS facilities, fixed or floating, including mobile drilling units (MODUs) to submit to the local U.S. Coast Guard Officer in Charge Marine Inspection (OCMI) 30 days before placing the facility in operation an Emergency Evacuation Plan (EEP) which addresses the items contained in 33 C.F.R. § 146.140(d). See 33 C.F.R. § 146.140(a) for facilities and 33 C.F.R. § 146.210 for MODUs.

Emergency Evacuation Drills. To be conducted annually: all elements of the EEP relating to evacuation of personnel must be exercised. To be conducted monthly: Drill demonstrating

ability of personnel on the facility to perform on-site duties contained in EEP. 33 C.F.R. § 146.125.

2. Standby Vessels. If designated as part of an EEP under 33 C.F.R. §§ 146.140 or 210, then the vessel(s) must meet the manning, capacity, and equipment requirements of 33 C.F.R. §§ 143.401, 405, and 407.

F. Offshore Structures - U.S. Aids to Navigation System. 33 C.F.R. Parts 62 and 67

See also 54 Fed. Reg. 16,927 (April 24, 1989), and 54 Fed. Reg. 48,607 (November 24, 1989). The U.S. Coast Guard requires all artificial structures which are erected on or over the seabed or subsoil of the OCS to be marked for mariners' benefit to assist navigation. *Id.* The United States became a party in 1982 to an agreement which implemented the International Association of Lighthouse Authorities (IALA) Maritime Buoyage System. As a result, the U.S. Coast Guard published a final rule November 7, 1987 revising the U.S. Aids to Navigation System so as to harmonize the System to the IALA Buoyage System. 52 Fed. Reg. 42,639 (November 7, 1987).

G. Offshore Structures - Cranes: Standards and Operator Qualifications

Over three years ago, the U.S. Coast Guard published proposed rules governing qualifications for crane operators on the OCS, as well as standards for design, installation, and testing of cranes. 51 Fed. Reg. 5547 (February 14, 1986); 54 Fed. Reg. 16,937 (April 24, 1989). Due to the August 29, 1989 MOU between the U.S. Coast Guard and the MMS, wherein jurisdiction over crane design and qualification on OCS platforms was transferred to the MMS, the proposed rulemaking was withdrawn. 54 Fed. Reg. 38,696 (September 20, 1989).

However, the U.S. Coast Guard shall retain jurisdiction over cranes upon MODUs. That portion of the rulemaking which related to MODUs has been incorporated into the major revision of MODU regulations noted at Article XII.U *infra*.

Meanwhile, the MMS shall regulate crane design and operator qualifications pursuant to 30 C.F.R. § 250.51(g). *See* Article X.F, *supra*; *see also* 55 Fed. Reg. 8485 (March 8, 1990) The MMS has proposed to delete 30 C.F.R. § 250.51(g) and reference crane operations at a new provision 30 C.F.R. § 250.20(c).

H. Offshore Structures - Safety and Environmental Regulation

1. Summary. The Secretaries of the DOI, the EPA, Army COE, and the DOT (U.S. Coast Guard) are charged with enforcement of safety and environmental regulations applicable to drilling and production operations, facilities used therefor, and which regulations are issued pursuant to the OCSLA. 43 U.S.C. §§ 1333, 1348(a); 46 U.S.C. §§ 3306(a); 4102 and 4302(a)(2); and 50 U.S.C. § 198. Note too, that the OSHA retains but has not exercised even concurrent jurisdiction over OCS employment safety and health standards pursuant to its statutory mandate as discussed in subsection 5 *infra*. 29 U.S.C. §§ 653(a) and (b)(1).

2. General Statutory Duties of any Offshore Lease or Permit Holder. 43 U.S.C. § 1348(b). The Lessee or permit holder shall:

a. Maintain on-lease places of employment "in compliance with occupational safety and health standards, free from recognized hazards" to employees and contractors. *Id.*

This standard is similar to the "general duty" clause of the Occupational Safety and Health Act: "Each employer - (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1) (1988).

b. Method. Conduct all on-lease operations in compliance with regulations intended to protect safety and environment. 43 U.S.C. § 1348(b) (1988).

c. Access. Allow prompt on-site access to safety inspectors and provide requested documents and records pertinent to health, safety, or environmental protection. *Id.* See also 33 C.F.R. § 142.4.

d. Frequency. The U.S. Coast Guard shall schedule periodic on-site inspections of each "fixed OCS facility." The inspections may be with or without advanced notice. 43 U.S.C. § 1348(c) (1988); 33 C.F.R. Parts 140 and 143. The time period between inspections shall be less than five years. 30 C.F.R. §§ 250.142(a) and (b).

- i. The U.S. Coast Guard also implemented self-inspection of fixed OCS facilities.
 - ii. Note, however, that the U.S. Coast Guard shall itself conduct the initial inspection of each OCS facility. 33 C.F.R. § 140.101(a).
3. Workplace Safety, Equipment and Conditions - OCS Facilities. The U.S. Coast Guard has established some general guidelines for personal safety equipment, platform workplace conditions, lifesaving and fire fighting equipment for OCS facilities. 33 C.F.R. Subparts 142-145.

One of the biggest current safety issues related to the U.S. Coast Guard standards involves 33 C.F.R. 142.90(b) and whether valves on piping on OCS facilities must be blocked off or actually blinded by a ram prior to working on a vessel into which the piping leads. See subsection 5 *infra* for a greater discussion of safety issues on the OCS.

- a. Obligations of Lessee, Permittee, and Operator. Similar to the language contained in the Occupational Safety and Health Act, the Lessee or permittee must maintain all places of employment within the lease or permit area both in compliance with the safety and health regulations of the U.S. Coast Guard, and "free from recognized hazards." 33 C.F.R. § 142.4(a). Be aware of this general obligation on the Lessee or permittee when contracting to put third party equipment, such as processing equipment or communications equipment on an OCS facility.

The operator has a slightly lesser obligation than the Lessee or permittee. The operator must only ensure that "operations subject to [its] control are conducted in compliance with [U.S. Coast Guard] workplace safety and health regulations . . . and, in addition, free from recognized hazards." 33 C.F.R. § 142.4(b).

Note, that U.S. Coast Guard regulations require either the owner or operator to designate "the persons on each OCS facility who shall be the person in charge." 33 C.F.R. § 146.5(a). In the case of emergency the U.S. Coast Guard requires that "nothing in the regulations in this subchapter [146] shall be so construed as preventing

the person in charge from pursuing the most effective action in that person's judgement for rectifying the conditions causing the emergency." 33 C.F.R. § 146.5(b). Be aware of this obligation and power when appointing an operator for your OCS lease.

- b. Approved and Equivalent Equipment. Titles 33 and 46 of the CFR sometimes require that the U.S. Coast Guard approve various items of lifesaving, fire-fighting, pollution prevention, and other safety equipment used in OCS activities. The U.S. Coast Guard publishes a manual entitled "CG-190, Equipment Lists," listing approved equipment. A copy may be obtained from the Commandant (G-MMT-2), U.S. Coast Guard, Washington, D.C. 20593.

However, as previously noted, the OSHA is considering publishing proposed regulations which may have some impact on those U.S. Coast Guard requirements.

The U.S. Coast Guard may also approve use of alternate equipment or procedures whenever the alternate "will insure a degree of safety comparable to or greater than that provided by the minimum standards provided in [Subchapters 140-146]." 33 C.F.R. § 140.15(a).

The U.S. Coast Guard has published proposed regulations revising content and construction standards for personal flotation devices. 54 Fed. Reg. 47,234 (November 13, 1989).

- c. General Workplace Conditions - OCS Facilities. 33 C.F.R. Part 143, Subpart C. Basically, keep all working surfaces, ramps, stairways clear of equipment and promptly clear substances other than drilling fluids, which create a tripping or slipping hazard. 33 C.F.R. § 142.84. Guard deck openings which are accessible to personnel. 33 C.F.R. § 142.87. Lockout and tagout any equipment which is powered by an external power source when working on that equipment. 33 C.F.R. § 142.90.
- d. Design and Equipment - OCS Facilities. 33 C.F.R. Part 143, Subpart B. This section establishes requirements

for escape routes, boat landings, guards or rails on OCS facilities, including additional requirements for floating OCS facilities.

- e. Personal Protective Equipment - OCS Facilities. 33 C.F.R. Part 142, Subpart B. Both the Lessee and the actual supervisor of a particular activity have a duty to ensure "that all personnel who are required by this subpart to use or wear personal protective equipment do so when within the lease area or the area covered by the permit." 33 C.F.R. § 142.24(a).

Standards include eye and face protection, head and foot protection, protective clothing, respiratory protection, safety belts and lifelines, and eyewash equipment.

- f. Lifesaving Equipment - OCS Facilities. The current U.S. Coast Guard requirements for lifesaving equipment, life floats, life preservers, life rings, lifeboats, and life rafts on manned and unmanned platforms appear at 33 C.F.R. Parts 144 and 146; see also 33 C.F.R. § 142.45, and 55 Fed. Reg. 18,142 (May 1, 1990) which may be of some applicability to offshore structures.
- g. Fire Fighting Equipment - OCS Facilities. 33 C.F.R. Part 145. The U.S. Coast Guard requires either portable or semi-portable fire extinguishers on OCS facilities.

- 4. Production Safety Systems - Subpart H (formerly National OCS Order No. 5). 30 C.F.R. §§ 250.120-127.

- a. Summary. Under the MMS/U.S. Coast Guard MOU, the MMS retains jurisdiction over safety issues relating to oil and gas production systems. Subpart H of the MMS regulations codifies former OCS Order No.5 and adds one new provision, 30 C.F.R. § 250.127. That provision relates to operating in zones containing or potentially containing Hydrogen Sulfide.

The MMS defines "production systems" to include separators, treaters, compressors, headers, flowlines, and all related facilities. 30 C.F.R. § 250.122(a).

- b. General Duty and Potential Vicarious Liability. "All production facilities . . . shall be designed, installed, and maintained in a manner which provides for efficiency, safety of operation, and protection of the environment." *Id.* The requirements for installation and operation of production safety systems apply to *all* production facilities on the leasehold whether or not owned or operated by the Lessee. *Id.*
- c. Subsurface Safety Devices. Install safety valves, tubing plug or injection valve in both new completions and in wells which are shut-in for over 6 months, and flow couplings. 30 C.F.R. § 250.121. Each subsurface safety device must be tested every six months for proper operation. 30 C.F.R. § 124(a)(1).
- d. Surface Safety Systems. All platform production facilities must conform to API standards, including piping, fire-fighting, electrical, gas-detecting and emergency shut-down systems. 30 C.F.R. § 250.122.
- e. Additional Production System Requirements. *See* 30 C.F.R. § 250.123 for standards for flow lines, pressure and fired vessels, engine exhausts, dehydration units, gas compressors, and procedures and areas for welding. *Id.* Note, that all safety sensors, including shutdown devices, valves, and pressure sensors in or on equipment must operate in a *manual* reset mode. 30 C.F.R. § 250.123(b)(4)(ii).
- f. Program of Erosion Control for Wells with History of Sand Production. 30 C.F.R. § 250.123(a)(11).
- g. Minimum Training Requirements - Production Safety Systems. *See* Article X *supra* for a discussion of current and proposed requirements for safety device training contained in Subpart O of the operating regulations.
- h. Surface and Downhole Safety Equipment - Periodic Testing and Maintenance of Test Records. 30 C.F.R. § 250.124. Surface and subsurface safety valves, as well as tubing plugs and injection valves must be tested at least every six months. All pressure and level control devices on equipment on a platform must be tested monthly, with no lapse of time greater than six weeks

between tests. The Lessee must also notify the MMS District Supervisor for inspection and testing prior to putting the integrated safety system into a production mode.

- i. Quality Control on Pollution Prevention and Safety Equipment. 30 C.F.R. § 250.126. All safety and pollution control equipment must be certified as having been manufactured in accordance with certain industry quality assurance standards. 30 C.F.R. § 250.126(c)(2).

5. The OSHA General Duty Clause; Coverage and Violations.

- a. Coverage. The section 5(a)(1) general duty standard was originally intended to apply to relevant employers if no specific standards had been promulgated by the OSHA and if the relevant safety or health conditions were not statutorily regulated by another federal agency. 29 U.S.C. §§ 654(a)(1) and (b)(1). As previously discussed *supra* at subsection 1, the Occupational Safety and Health Act is applicable to employment on the OCS, even if the OSHA has not exercised its authority to date. 29 U.S.C. § 653(a); 43 U.S.C. § 1348(d).

The general duty clause has been held not to be void for vagueness and the clause does not constitute an unconstitutional delegation of legislative power to the OSHA. *REA Express, Inc.*, 1 BNA OSHC 1241 (1973), *aff'd*, 495 F.2d 822 (2d Cir. 1974). *See also Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983), *cert den.* 466 U.S. 937 (1984); *Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981). Thus, one may conclude that the OSHA general duty clause is applicable to at least employment on fixed facilities on the OCS. 29 U.S.C. § 653(a).

- b. Preemption of General Duty Clause by Specific Standards. The question arises: does the issuance of specific OSHA health or safety standards preempt application of the general duty clause? The traditional answer under the OSHA regulations has been yes. Application of the general duty clause was preempted whenever a specific standard applied to the hazardous condition in dispute. *See, e.g., Usery v. Marquette*

Cement Manufacturing Co., 568 F.2d 902 (2d Cir. 1977); *Daniel International Inc.*, 10 BNA OSHC 1556 (1982). However, in 1987 the District of Columbia Circuit Court of Appeals in *United Auto Workers v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) held that an employer may violate Section 5(a)(1) *even if* it complies with a relevant specific standard. If an "employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers." *Id.* at 1577.

The decision substantially expanded the OSHA's powers to regulate safety and health conditions under the general duty clause. The OSHA has yet to utilize the decision to cite employers who comply with specific Occupational Safety and Health Act standards but may still be in violation of section 5(a)(1). *See, e.g., A. Prokosch & Sons Sheet Metal Inc.*, 8 BNA OSHC 2077 (1980), wherein the OSHRC held that it was inappropriate to cite an employer for violation of the general duty clause even when only an OSHA advisory standard applied.

In light of the *UAW*, decision, *supra*, two questions arise in relation to the applicability of the Occupational Safety and Health Act to OCS operations. First, does the general duty clause of the Act apply to employment on the OCS? The answer is yes. The Occupational Safety and Health Act applies to "Outer Continental Shelf lands" by definition of the Act itself 29 U.S.C. § 653(a) (1988). The only exceptions to this mandate are working conditions of employees which are by federal statute regulated by some other federal agency. 29 U.S.C. § 653(b)(1) (1988).

Then, does the OCSLA, as amended, give either the MMS or the U.S. Coast Guard the exclusive power to

regulate employment-related safety and health standards on facilities located on the OCS? The answer is somewhat complicated, but the best position appears to be no. The OSHA retains substantial authority to regulate employment-related safety and health conditions for facilities located on the OCS.

First, we need to look at the regulatory authority granted to the MMS and U.S. Coast Guard by the OCSLA, as amended. Section 21(b) of the Act states that the MMS and U.S. Coast Guard "shall require on all new drilling and production operations and wherever practicable, on existing operations, the use of the best available and safest technologies which the Secretary determines to be economically feasible, wherever failure of the equipment would have a significant effect on safety, health, or the environment" 43 U.S.C. § 1348(b) (1982).

While not a direct grant of authority to regulate employment safety and health conditions, the statute mandates that the agencies review equipment-related technological standards so that the safety and health of affected individuals is not unduly affected. As such, the BAST standard does not in and of itself supplant the OSHA's traditional authority over occupational safety and health standards.

Section 21(c) of the OCSLA, as amended, presents a more difficult question. Section 21(c) states in relevant part that "[t]he Secretary of the Department in which the U.S. Coast Guard is operating shall promulgate regulations or standards applying to unregulated hazardous working conditions related to activities on the OCS when he determines such regulations or standards are necessary." 43 U.S.C. § 1348(c).

While the quoted language does not appear to give the U.S. Coast Guard a *carte blanche* to regulate safety and health standards on OCS facilities, the Act does at least appear to give the U.S. Coast Guard the lead role in regulating offshore safety issues. The House Conference Report appended to the 1978 amendments to the OCSLA confirms this arrangement: "The Conference Report follows the House intent and

requires regulations as to unregulated hazardous working conditions in the OCS only by the Coast Guard." House Conf. Report No. 95-1474, 1978 U.S. Code Congr. and Admin. News at 1709.

However, Congress did not intend for the statutory grant immediately to supplant any current OSHA regulations. Congress also contemplated that the U.S. Coast Guard would consult with the OSHA in developing any such regulations: "In adopting the language providing for OCS workers' safety regulations to be promulgated by the U.S. Coast Guard, and also providing for the existing authority of the Secretary of Labor (through the OSHA) as to workers' safety to be retained, the Congress clearly intend neither to reduce, nor add to the existing OSHA authority under section 466(1) of the Occupational Safety and Health Act."

This section merely requires the U.S. Coast Guard to undertake expedited action where it deems it necessary to regulate hazards currently unregulated by the Government. Under its existing authority, and section 4(b)(1) of the Occupational Safety and Health Act, the U.S. Coast Guard may take any appropriate action necessary to regulate any hazard, and may over time displace the applicability of the OSHA standards to other working conditions through exercise of appropriate rulemaking actions. However, the conferees intend that consultation with the OSHA "in any such U.S. Coast Guard action, will assure that employees receive no less protection than under existing standards. Consistent goals contained in recent OSHA-U.S. Coast Guard agreements which maximize the safety and health protection of employees, avoiding duplication of effort, and avoiding undue burden on the maritime industry are also endorsed by the conferees." *Id.* at 1709.

- c. Summary of Regulatory Responsibility. Thus, Congress envisioned that the U.S. Coast Guard would take the lead role in addressing worker-related safety issues on OCS facilities, but that such role would involve close consultation with the OSHA. Current OSHA safety standards applicable to OCS facilities would continue to apply until supplanted by subsequent U.S. Coast Guard

regulation. In accord *Marshall v. Nichols*, 486 F. Supp. 615 (E.D. Tex. 1980), which rejected the OSHA's assertion that the offshore oil industry is subject to the OSHA's general construction industry regulations.

Worker health-related issues appear to remain the primary bailiwick of the OSHA, except perhaps where MMS or U.S. Coast Guard rules promulgated under BAST requirements, or the DOT Office of Pipeline Safety rules promulgated under its pipeline-related jurisdictional mandate tangentially affect employee health issues. Congress expects the U.S. Coast Guard and the OSHA, the primary agencies governing OCS-related worker health and safety, to enter into agreements so as to avoid duplicative regulation in areas where jurisdiction may overlap.

As between the MMS and U.S. Coast Guard, the 1989 MOU separates safety jurisdiction along production-related lines. That is, the MMS is responsible for safety issues on OCS facilities involving actual drilling, producing, or development operations. The U.S. Coast Guard otherwise deals with employee safety issues on OCS facilities.

Also, under traditional jurisdictional lines, the U.S. Coast Guard will continue to regulate the safety of "seamen," while the OSHA shall establish standards for persons engaged in longshoring activities. *Taylor v. Moore-McCormack Lines Inc.*, 621 F.2d 88 (4th Cir. 1980); *In Re Inspection of Norfolk Dredging Co.*, 595 F. Supp. 517 (D. Fla. 1984).

Offshore pipeline safety issues remain under the purview of the DOT. See Article XVI, *infra*.

Finally, the rationale of the *UAW* case appears equally applicable to specific safety standards published by agencies other than the OSHA in light of Section 21(d) of the OCSLA. 43 U.S.C. § 1348(d). That is, the OSHA general duty standard is probably applicable to employment on at least OCS facilities, if not vessels engaged in OCS support activities too. Thus, the elements of a violation of the general duty clause deserve review.

- d. Violation of the General Duty Clause. There are four elements to a general duty clause violation.
- i. Were the employees exposed to a significant risk of harm (hazard)? *See, e.g., Kastalon Inc.*, 12 BNA OSHA 1928 (1986).
 - ii. There must be a "recognizable hazard", i.e., a condition or practice in the workplace that is known to be hazardous either by the employer's general industry or by the specific employer itself. *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317 (5th Cir.), *reh. denied*, 738 F.2d 437 (5th Cir. 1984).
 - iii. The hazard must either cause or be likely to cause serious physical harm or death. *See, e.g., Anoplate Corp.*, 12 BNA OSHA 1678, 1686 (1986).
 - iv. The hazard must be subject to reasonable abatement. That is, the OSHA must specify the steps that the employer should have taken in order to avoid a violation and also demonstrate the feasibility and likely utility of those steps. The OSHA may seek to have the employer upgrade its safety training program in order to prevent hazardous employee conduct.

Alternatively the OSHA may seek to have the employer provide additional physical protection such as equipment to abate the hazard. The employer may challenge the OSHA citation and order on the basis that it is not feasible to install the equipment, or that if feasible, that installation would not eliminate or abate the hazard. *See, e.g., Phillips Petroleum Co.*, 11 BNA OSHC 1776 (1984). Finally, one should also note that the abatement method required by the OSHA will be upheld even if the method exceeds the general standard of protection used by the employer's industry, as long as the method is feasible. *Litton Systems*, 10 BNA OSHC 1179 (1981).

- e. The OSHA Citation Power and Enforcement Proceedings. Theoretically, under the recently expanded scope of the general duty clause, or under any future OSHA well servicing regulations, an OCS Lessee could possibly face an OSHA-related inspection. (Most likely the U.S. Coast Guard or the MMS would conduct any actual offshore inspection pursuant to an inter-agency MOU.) See Article XVIII *infra* for a discussion of the OSHA's citation power and enforcement proceedings.

I. Pollution Prevention and Control - Subpart C 30 C.F.R. §§ 250.40-46

1. Summary. Subpart C consolidated the far flung requirements which previously appeared in OCS Order No. 7 Pollution Prevention and Control; former 250.43 Pollution and Waste Disposal; former 250.57 Air Quality; former 250.54 Marking of Equipment; and portions of OCS Order No. 1 Identification of Wells, Platforms, Structures, Mobile Drilling Units, and Subsea Objects.
2. General Duty. 30 C.F.R. § 250.40 states the OCS Lessee's general duty: "During the exploration, development and production, and transportation of oil and gas, the Lessee shall take measures to prevent unauthorized discharge of pollutants into the offshore waters. The Lessee shall not create conditions which will pose unreasonable risk to the public health, life, property, aquatic life, wildlife, recreation, navigation, commercial fishing, or other uses of the ocean."

Daily Inspection. "Drilling and production facilities shall be inspected daily . . . to determine if pollution is occurring." 30 C.F.R. § 250.41(a). Make sure the results of daily inspections are recorded in the platform operations logbook so that occurrence of inspections can be verified.
3. Scope of Duty. Pollution control on the OCS actually encompasses four separate areas: oil and gas spill pollution, disposal of liquids such as drilling muds, solid wastes disposal, and air pollution. Each category shall be addressed separately.

J. Oil Spills

1. Summary. The primary current statutory authority for regulating oil spills is § 311 of the Federal Water Pollution

Control Act of 1948 (Clean Water Act or CWA) and § 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (i.e., non-routine discharges). 33 U.S.C. § 1321. In the wake of the Exxon Valdez and Mega Borg oil spills however, Congress is attempting to formulate revised language for managing such spills. Barring the implementation of new legislation the following provisions of the CWA and the CERCLA govern accidental discharges into navigable waters.

Section 311 of the CWA reads in pertinent part as follows:

"The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the OCS Act, . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . in such quantities as may be harmful as determined by the President . . . is prohibited, except . . . where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful." *Id.*

Liability for cleanup costs under Section 311 is without regard to negligence. The only defenses are that the discharge was caused *solely* by an act of God, act of war, negligence on the part of the U.S. Government, or an act or omission of a third party. 33 U.S.C. § 1321(g) (1988).

The act of a third party is only a partial defense. Unless the U.S. determines that the discharge was caused solely by an act of the third party, the vessel, rig or lease owner/operator must pay to the U.S. the maximum liability due. The owner/operator is then subrogated to the government's claim against the third party. 33 U.S.C. § 1321(h).

For vessels see also the Trans-Alaska Pipeline Act of 1973, 43 U.S.C. §§ 1651, 1653(b) and (c), and the *Trinidad v. S.S. Keiyoh Moru*, 845 F.2d 818 (D.Ct. Ak. 1988) case for special liability rules applicable to vessels and oil spills which occur within the right of way granted under the Act. Note also, that under the CWA maximum liability for discharging vessels is statutorily limited. 33 U.S.C. § 1321(f). Non-discharging vessels which are negligent to any degree in causing the discharge cannot utilize the liability limitations. *United States v. Big Sam*, 681 F.2d 432 (5th Cir. 1982).

Note also, that under the CWA the U.S.'s expenses need not be reasonable to be recovered. *United States v. Beatty, Inc.*, 401 F. Supp. 1040 (W.D. Ky. 1975).

2. Harmful Oil Discharge. A "harmful oil discharge" under the CWA is a discharge which either violates applicable water quality standards, or causes a film or sheen upon or discoloration of the surface of the water or causes a sludge or emulsion to be deposited. 40 C.F.R. §§ 110.4 & 5.
3. Dispersants or Emulsifiers. Addition of either a dispersant or an emulsifier in order to circumvent the above standards is prohibited. 40 C.F.R. § 110.6.
4. Relationship to Section 402 of the CWA. Routine discharges under Section 402 NPDES Permits are excluded from regulation under Section 311 oil spill requirements. 33 U.S.C. § 1321(2).
5. Spill Prevention Control and Countermeasure Plan. Ostensibly the regulations promulgated under Section 311 of the CWA require owners and operators of non-transportation-related facilities, both onshore and offshore, which might discharge harmful quantities of oil into navigable waters of the United States to prepare a Spill Prevention Control and Countermeasure Plan (SPCC). 40 C.F.R. §§ 112.1(a), 3 and 7; see also 40 C.F.R. Part 112, Appendix for a Memorandum of Understanding between the DOT and the EPA which defines "non-transportation-related onshore and offshore facilities."

However, the MMS already requires all operators of fixed OCS oil and gas facilities to file an Oil Spill Contingency Plan (OSCP) prior to engaging in offshore operations. 30 C.F.R. §§ 250.33(b)(2) and 34(b)(3). The EPA and MMS requirements for an OSCP and a SPCC Plan for fixed OCS oil and gas facilities overlap and sometimes conflict. As noted in subsection 15 *infra*, the MMS and the EPA are currently negotiating and trying to resolve this regulatory impasse. 53 Fed. Reg. 10,615 (April 1, 1988).

6. Offshore Oil Pollution Compensation Fund. 43 U.S.C. §§ 1811-1824 (1982).

- a. Summary. The Offshore Oil Pollution Compensation Fund (the Fund) dovetails with the CWA and creates potentially an additional source of liability for oil spills caused by owners or operators of either vessels or facilities on the OCS:

"The owner or operator of a vessel other than a public vessel, or of an offshore facility, which is the source of oil pollution, or poses a threat of oil pollution in circumstances which justify the incurrence of the type of costs described in [subsections 311(c),(d), or (l) of the CWA], shall be jointly, severally, and strictly liable for all loss for which a claim may be asserted under section 303 of this title." 43 U.S.C. § 1814(a) (1982).

Section 302 of the 1978 Amendments to the OCSLA created this fund which is administered through the Secretary of Transportation by the U.S. Coast Guard. 33 C.F.R. Part 135. The Fund is intended to provide monies to compensate parties for claims of economic loss from an oil spill originating on the OCS. Double recovery for the same damages under any other law is prohibited, however. 43 U.S.C. § 1820(a)(1982). *See, e.g.,* 33 U.S.C. § 1321 (1988).

The Fund is based on fees not to exceed 3¢/barrel levied on OCS oil production. The U.S. Coast Guard fixed the levy permanently at 3¢/barrel, to be effective whenever the Fund contains less than \$200 million

dollars. 33 C.F.R. § 135.103; 55 Fed. Reg. 17,267 (April 24, 1990).

Recovery at least in the first instance is not necessarily from persons causing the spill, but from the owner or operator of a vessel or offshore facility "which is the source of oil pollution, or poses a threat of oil pollution" which justifies incurring certain pre-cleanup costs. 43 U.S.C. § 1814(a) (1982).

- b. Definition of "Owner" - Vicarious Liability. Note that the statutory definition of owner includes "any person holding title to, or in the absence of title, any other indicia of ownership of, a vessel or offshore facility, whether by lease, permit, contract, license, or other form of agreement." 43 U.S.C. § 1811(19) (1982). Also the definition of "offshore facility" includes pipelines. 43 U.S.C. § 1811(8) (1982).

Thus, the Lessee of record is liable for spills caused by a farmouttee or a contract operator. Be aware of this fact and draft underlying agreements and indemnity and supporting insurance provisions accordingly.

- c. Supplemental Liability. The Fund supplements the provisions of the CWA, i.e., it imposes requirements of financial responsibility, notification, and penalties for oil spills in addition to those under the CWA. 43 U.S.C. § 1820(c) (1982). *See also* 33 U.S.C. § 1321.

The relationship between natural resource damage assessments (NRDA) under the CERCLA (*see* Article XII.Q *infra*) and 43 C.F.R. Part 11 and the Fund is unclear. The trustee can assert a NRDA claim against the Fund. 43 U.S.C. § 1813(a)(2)(C) (1982). However, by such assertion, the owner's or operator's total liability for the spill does not seem to be affected. *See* 43 U.S.C. § 1813(b)(3) (1982).

Under the Fund an owner's exposure is "capped" at the total of removal and cleanup costs, plus an additional \$35,000,000 for all damages. 43 U.S.C. § 1814(b)(2) (1982). Additionally, all costs of removal incurred by a governmental entity must also be borne by the relevant

owner or operator. 43 U.S.C. § 1814(d) (1982). See 33 C.F.R. Parts 135 and 136 for the claims procedure.

- d. Sole Liability Exception. Similar to the CWA, no liability arises on behalf of the relevant owner or operator if the incident is caused by the sole negligent or intentional act of the damaged or any third party. 43 U.S.C. § 1814(c)(2) (1982).
- e. Claims Procedure. See 33 C.F.R. Parts 135 and 136 generally. Note, that a claim for compensation against the Fund must be presented in writing the *earlier* of within three years of discovery of the economic loss for which recovery is sought, or within six years of the date the incident occurred. 33 C.F.R. § 136.101(a).
- f. Indemnity and Guarantee. The owner or operator of an OCS facility may enter into an indemnity agreement with the leaseholder. However, any such agreement will not alter the underlying liability of the owner or operator for a spill under applicable law. 43 U.S.C. § 1815(e) (1982).

Also a guarantor of the owner, operator, or leaseholder is only liable to the extent of its guarantee. 43 U.S.C. § 1815(c)(2) (1982).

- 7. State Liability and Common Law Remedies Schemes. States may validly legislate liabilities for oil spills occurring on state territorial waters, and the CWA does not preempt such statutory schemes. *Ouellette v. International Paper Co.*, 602 F. Supp. 264 (D.Vt. 1985), *aff'd*, 776 F.2d 55 (2d Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 481, (1987). See, e.g., Alaska pollution statutes A.S. 46.03-710 850 and 46.04.010-120.

Indeed, the CWA also does not preempt application of common law and general maritime law nuisance concepts and remedies. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Middlesex County Sewage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981).

For example, actions for damage to shoreside property may be brought in admiralty under the Admiralty Extension Act. 46 U.S.C. § 740.

8. Operational Requirements. The MMS requires all EP, DPP, and DOCD to include oil spill containment and cleanup plans. 30 C.F.R. §§ 250.33(b)(2) and 34(b)(3).
9. Oil Spill Contingency Plans (OSCP). 30 C.F.R. § 250.42. Fortunately, the MMS authorizes the Lessee to submit just one regional OSCP which covers all of a Lessee's Gulf of Mexico operations, including facilities, pipelines, and supply boats. The Lessee then may simply reference the approved plan when submitting an EP, DPP, or DOCD for a particular OCS lease. *Id.*
10. The OSCP Requirements: *See* 30 C.F.R. § 250.42. Former OCS Order No. 7, Paragraph 3.2, although no longer in force and effect, and U.S. Coast Guard/MMS Guidelines attached to NTL 86-02, April 25, 1986, provide some insight into greater detail than 30 C.F.R. § 250.42 as to what an OSCP should contain. The basic parameters are as follows:
 - a. Oil spill trajectory analysis;
 - b. Identification of response equipment and supporting materials;
 - c. Dispersant-use plan. *See also* 33 C.F.R. § 153.300 and 40 C.F.R. § 300.81;
 - d. Inspections and maintenance of response equipment;
 - e. Detection and notification procedures;
 - f. Inventory of locally and regionally available equipment, materials, and supplies;
 - g. Post-spill discovery action plan; and
 - h. Alaska only: Plan for ignition of oil spill.
11. Role of an Attorney in an Oil Spill. The details necessary to flesh out an OSCP will likely be assembled by engineers and environmental specialists. Even more importantly to our discussion, what role should an attorney play in overseeing and implementing the Plan? The attorney's role is a crucial role since the clients will likely seek their assistance in a crisis.

Moreover, it is important to the entire industry that the persons involved in an oil spill respond promptly and correctly.

12. The Ten Questions. One should attempt to determine the following if a serious spill occurs:

- a. What is the exact location of the spill?
- b. What is the source of the spill? Is it ours?
- c. Whether the spill is still occurring and at what rate?
- d. How much oil has been spilled?
- e. What is the geography, environmental sensitivity, and water depth of the spill site?
- f. What is the gravity or other physical characteristics of the spilled oil?
- g. Are there any potential hazards possibly associated with the proposed containment and cleanup? (See 33 C.F.R. § 153.300 for certain U.S. Coast Guard cleanup-related requirements).
- h. What are the current and expected weather conditions?
- i. Which dock or staging area should be used?
- j. Who will provide the trained work force?

With this information one can then decide what course of action to take. The first five considerations make the proper response apparent. The sixth, characteristics of the oil determines the type of equipment to be used. The seventh, hazards, may limit how close to the spill origin one may work and thus affect the method of combatting the spill. The eighth, weather, plays an important role in operating procedures and decisions. For example, during high winds recovery attempts could be futile as well as dangerous. The ninth, focuses the work force and time necessary to assemble. The tenth, requires one to consider the number and availability of equipment operators, boat operators, mechanics, and roustabouts to be sent to the staging area.

13. The Ten Legal Commandments. An attorney supporting implementation of an OSCP should be prepared to respond as follows:
- a. Review the OSCP on a routine basis in order to assure knowledge of response requirements.
 - b. Obtain right-of-way and other clearances necessary to aid in the spill cleanup. This includes the U.S. Coast Guard's approval of method of removal of the oil. 33 C.F.R. § 153.300.
 - c. Conduct interviews of witnesses. Prompt acquisition of testimony will help minimize exposure in subsequent litigation.
 - d. Serve as legal counsel at all news conferences and other public meetings. Your clients will respond more effectively to the press with your presence and support.
 - e. Participate in the development and review of *all* information pertaining to the spill which will be released outside of the company.
 - f. Review contracts between company and cleanup contractors. Be sure to include language which requires contractors' employees not to speak to the press without your permission.
 - g. Participate in meetings of the spill team and the post-spill review.
 - h. Assist in the drafting of the spill report and any Natural Resource Damage Assessment.
 - i. Monitor people allowed into the spill area.
 - j. Monitor your own photographers, consultants, and investigators.

If the above procedure is followed, then the attorney will likely keep his/her client from burying itself into any more trouble than that already caused by the spill.

14. OSCP - Documentation Procedures. For all oil spills that require cleanup activities, the supervisor at the relevant shore base vessel or facility should maintain a log book which indicates procedures utilized and the time the particular procedures are implemented, as well as the time equipment moves in and out to deal with the spill.

Additionally, if the company hires any third party contractors to help with the spill, the author would request those contractors to keep similar log books.

As previously noted, the EPA's regulations governing offshore oil spills (40 C.F.R. Part 110) require that telephone notice be given to the National Response Center (NRC). Therefore, one of the first records to be generated about a spill should reflect what information was provided to the NRC. The EPA's regulations further require compliance with the DOT/U.S. Coast Guard's regulation for notifying the NRC. 33 C.F.R. Part 153.

The U.S. Coast Guard has also developed requirements for the removal of discharged oil. 33 C.F.R. 153.301. These require that certain methods be used and prohibit the use of chemical methods unless approved by the U.S. Coast Guard's On Scene Coordinator. Therefore, the records to be maintained should include a description of the methods used for removal, the type sorbent used, hydrographic and meteorological conditions, availability of mechanical methods for containment and recovery, specifics of the approval (if any) by the U.S. Coast Guard to use dispersants, and the method and place of disposal of the oil removed.

The OSHA's new Hazardous Waste Operations and Emergency Response worker protection standards require that workers utilized in the emergency response *and* the post-emergency response (i.e., cleanup) receive training on the hazards associated with the material being cleaned up. This standard applies to oil spills. Therefore, records should be maintained as to the training given to (or already received by) the response team. See 29 C.F.R. § 1910.120 for details. Another reason for the above requirements is that Section 22 of the OCSLA requires both the MMS and the U.S. Coast Guard to investigate any major offshore accidents or spills. Additionally, when a pipeline is involved, the DOT also will participate in the investigation. The investigation is usually

conducted by a federal panel with representatives from each agency. The agencies basically question all personnel involved in both the accident and the cleanup of the accident itself.

For that reason, it is important that the respondent maintain log books on what took place as well as a representative of each third party contractor as the respective employees will be quizzed by the investigatory body. In evidentiary terms, the log books represent either past recollection recorded or business records and contents therein are admissible evidence under hearsay exceptions contained in both federal and state evidence codes. Information and impressions recorded closer to the event will carry much more weight in any subsequent proceeding than subsequent testimony before the investigatory board especially if the investigatory board takes two weeks, a month or however long to convene after the accident has occurred.

In a major spill, continue all of the above log book procedures and also require all personnel to make entries and observations on an hourly basis; not only of the procedures implemented and equipment utilized, but also of the presence of other third parties in the area of the spill, sea conditions, etc. Additionally, interview as soon as possible, the individuals who were on or working with the platform, vessel, or pipeline, which resulted in the spill so that their testimony can be "frozen" in place as close to the time of the actual events as possible.

Finally, the author suggests that an individual from the respondent's company take a helicopter ride over the spill and video tape or photograph the extent of the spill, especially in its early stages. That information can be useful to show that the respondent acted quickly and properly in combating the spill.

15. U.S. Coast Guard Oversight and Technical Review. Note that under the August 29, 1989 MOU between the MMS and U.S. Coast Guard, that the U.S. Coast Guard will oversee implementation of the Plan, as well as provide technical review as to the adequacy of the Lessee's Plan. 54 Fed. Reg. 39,823 (September 28, 1989) at Section VII.
16. Oil Spill Response Team Training and Drills. 30 C.F.R. § 250.43. "The Lessee shall ensure that the oil spill response

operating team is provided with training . . . at least annually in the deployment and operation of the pollution control equipment to which they are assigned." *Id.*

In support of this requirement, as of July 1, 1989, the MMS may require one of four types of oil spill containment and cleanup drills from a randomly selected operator in the Gulf of Mexico. (An operator may voluntarily participate in the "table top" simulations in 12(d) *infra*).

See Appendix B for two recent examples of actual MMS oil spill containment and cleanup drills.

- a. Unannounced Drill with Equipment Mobilization Only. At a minimum the operator must assemble that portion of their oil spill response operating team (OSROT) necessary to operate the Clean Gulf Associates (CGA) equipment at the relevant CGA base, procure a boat, and load the Fast Response System (FRS).
- b. Unannounced Drill with Equipment Mobilization and Deployment. Similar to the above drill, except that the OSROT is to deploy the equipment at the site of the simulated spill or other location designated by the Regional Supervisor.
- c. Spot "Table Top" Drills. The MMS initiates such drills at a randomly selected company's office.
- d. Announced "Table Top" Simulation of a Large Oil Spill. The MMS, the U.S. Coast Guard, and other Federal and State agencies and a volunteer or selected operator in an announced simulation of a large oil spill.

No mobilization or deployment of equipment or personnel is necessary. The purpose of the simulation is to familiarize the various governmental and industry representatives with the decision making and coordination necessitated by a large oil spill.

- e. Report. A written report detailing the actions taken shall be submitted to the MMS within 15 days after the completion of any unannounced drill.

17. Oil Spill Reporting Requirements. All oil spills should be reported (1) immediately by telephone or radio telecommunication to the Duty Officer, National Response Center, U.S. Coast Guard, Washington, D.C. at 1-800-424-8802; and (2) orally to the MMS District Supervisor immediately, if greater than 1 barrel, or within 12 hours, if less. 30 C.F.R. § 250.41. See Article XIII., Production-Related Reporting Requirements, for greater detail on spill reporting requirements.
18. Comprehensive Chart of Oil/Hazardous Substance Reporting Requirements. See Article XIV for a comprehensive list of spill reporting requirements.
19. Conflict With the EPA Spill Prevention Control and Countermeasures (SPCC) Plans. The MMS does not believe SPCC Plans are appropriate on the OCS and is currently seeking to resolve any conflicting obligations imposed on OCS Lessees by entering into a MOU with the EPA. 53 Fed. Reg. 10,615 (April 1, 1988). Currently, OCS oil and gas facility owners or operators are required to have SPCC Plans under the EPA regulations. 40 C.F.R. Part 112. Hopefully the MMS and the EPA will coordinate their requirements so that no conflicting regulatory obligations will shortly exist. Note however that the U.S. Coast Guard as On-scene Coordinator has the responsibility to implement both plans. This should help minimize application of inconsistent regulatory requirements.
20. Prevention of Oil Pollution from Ships- Summary. Previously the U.S. Coast Guard regulated vessel safety for all tank vessels, foreign or domestic, which are utilized to transport or transfer oil or hazardous cargoes in ports or other places subject to United States jurisdiction pursuant to the Ports and Waterways Safety Act of 1972. 33 U.S.C. § 1221; 33 C.F.R. Parts 151, 155. Subsequently in 1978, The Port and Tanker Safety Act was enacted into law. That Act incorporated certain tank vessel standards developed by the 1978 International Conference on Tanker Safety and Pollution Prevention. The amendments helped improve the supervision and regulation of all vessels active in the navigable waters of the United States as well as vessels which transported or transferred oil or hazardous cargoes in either ports or places subject to United States jurisdiction.

Next in 1980, Congress implemented the portions of the MARPOL Protocol of 1978 which related to prevention of pollution from ships. 33 U.S.C. § 1901.

Fortunately in 1983 Congress consolidated the maritime safety laws administered by the U.S. Coast Guard at 46 U.S.C. § 3701 *et seq.* The codification organized the laws applicable to crude oil tankers and bulk hazardous materials carriers into Chapter 37 of the enactment. See Public Law 98-89, Partial Revision of Title 46, United States Code, Shipping. 1983 U.S. Code and Cong. and Adm. News at 924.

Also in a related development, the U.S. Coast Guard has proposed implementing Annex I of International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78). 51 Fed. Reg. 4768 (February 7, 1986). For further reading see Abecassis D.W. and Jarashow R.L., *Oil Pollution From Ships: International, United Kingdom, and United States Law and Practice*, 2d Ed. Toronto: Stevens, Methven 1986.

21. Training: Offshore Oil Spill Response Seminars. The MMS occasionally conducts a seminar on oil spill response. Such a seminar was held on December 13, 1989, in the MMS Herndon, Virginia offices. 54 Fed. Reg. 46,478 (November 6, 1989). Sessions covered the following topics: General response requirements, mechanical containment and cleanup, chemical treating agents, and burning oil on the ocean surface.

K. Offshore Solid and Liquid Wastes Disposal

1. Summary. Discharges from fixed platforms or structures and mobile drilling units are regulated by the EPA pursuant to various sections of Federal Water Pollution Control Act of 1948. 33 U.S.C. § 1251 *et seq.*, (the CWA, as amended) and by the U.S. Coast Guard pursuant to Annex V of MARPOL 73/78. The CWA divides pollution into two basic categories; pollution emanating from a specific point source or that emanating from a non-point source. To date most EPA regulations have relied upon regulation of pollution based upon point source related regulations. 33 U.S.C. § 1362(14). One principal objective of the 1987 amendments to the CWA is to move the NPDES program beyond technology-based pollution controls into controls focused on achieving and maintaining certain water quality objectives. The potential

impact if any of the amendments upon the current NPDES regulatory structure is still unclear. *See* EPA Regulatory Timetable No. 3215, 55 Fed. Reg. 16,842 (April 23, 1990).

2. Purpose. The goal of the CWA is to eliminate the discharge of pollutants into surface waters of the United States through the use of two programs: water quality based standards (water into which the discharge is flowing); and point source effluent limitations (regulate the amount of pollution itself which may be discharged within a certain time frame). 33 U.S.C. §§ 1312(a), 1313, and 1362(11).
 - a. Basic Rule Applicable to the OCS. Discharge of any "pollutant" from any "point source" into navigable waters is unlawful unless the discharge occurs pursuant to a permit issued under section 402 of the CWA. 40 C.F.R. § 122.2; 33 U.S.C. § 1342. Section 402 creates the NPDES for permitting point source discharges from industrial sources. The NPDES permit is the mechanism by which effluent limitations and water quality standards are applied to individual point sources. The term "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, . . . conduit, . . . container, . . . operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
 - b. Excluded Discharges. Not every discharge related to OCS activities is regulated pursuant to a NPDES permit. For example sewage from vessels or any discharge incidental to normal operation of a vessel is not regulated pursuant to a NPDES permit. 40 C.F.R. §122.3(a). Discharges of dredged or fill material are instead regulated under section 404 of the CWA. 40 C.F.R. § 122.3(b). Finally pollution caused by leaks or spills of oil or hazardous substances is not regulated pursuant to a NPDES permit. 33 C.F.R. § 153.101. *See also* 40 C.F.R. Part 110 Discharge of Oil into Navigable Waters generally.
 - c. Effect of an NPDES Permit. Compliance with the terms contained in the NPDES permit constitutes compliance with the CWA except for a limited number of toxic effluent standards and certain related

prohibitions imposed under section 307 of the CWA. 33 U.S.C. § 1317 (1988); 40 C.F.R. Part 129. Pollutants considered "toxic" under Section 307 of the CWA and subject to specialized individual discharge limitations are Aldrin/Dieldrin, DDT, Endrin, Toxaphene, Benzidine, and Polychlorinated Biphenyls (PCB's).

Additionally, any discharge which is a point source subject to an NPDES Permit is excluded from the definition of a "solid waste" under the RCRA, 42 U.S.C. §§ 6901-6991 (Supp. V 1987) and is therefore free from regulation as a RCRA solid or hazardous waste 42 U.S.C. § 6903(27) (Supp. V 1987).

- d. Generally Applicable Permit Conditions. See 40 C.F.R. § 122.41 for general conditions applicable to all NPDES permits. Those conditions include *inter alia*, the duty to comply with all conditions of the permit, to monitor discharges, and to allow inspection of the permittee's premises and records. Note also that 40 C.F.R. § 124.41(l)(6) requires the permittee orally to report within 24 hours any incident of non-compliance "which may endanger health or the environment."

Additionally 40 C.F.R. § 122.42 details conditions which are applicable only to specific categories of the NPDES permits.

The unique provision 40 C.F.R. § 122.44 was added in the 1987 revisions to the CWA and is known as the "anti-backsliding" provision of the CWA. 33 U.S.C. § 1342(o). Renewed, reissued, or modified NPDES permits must contain standards at least as stringent as prior permits with certain exceptions noted in the statute. The exceptions should be studied prior to seeking a revision to a NPDES permit.

- e. Justifications for Violating the Terms of an NPDES Permit. Does the violation of a standard contained in a NPDES permit automatically lead to the EPA enforcement action of some sort? Not necessarily. The EPA regulations authorize deviations from the NPDES effluent limitations in two situations commonly known

as a "bypass" and a system "upset." 40 C.F.R. §§ 122.41(m) and (n).

- i. Bypass - Intentional diversion of waste. Three conditions are necessary to be present in order to constitute a bypass: Unavoidable to prevent loss of life, personal injury, or severe property damage (which does *not* include economic loss caused by delays in production); no feasible alternative courses of action exist; and the EPA (or state) is notified. 40 C.F.R. § 122.41(m).
- ii. Upset - "An exceptional incident in which there is unintentional and temporary non-compliance with technology-based effluent limitations because of factors beyond the reasonable control of the permittee." Three conditions are necessary in order to constitute an upset: The cause of the upset is identified; the facility was operating properly at the time; and the operator gave notice within 24 hours of the incident to the EPA (or state). 40 C.F.R. § 122.41(n).

Note that an "upset" is an affirmative defense to violation of technology based effluent limitations contained in a permit. Thus one must satisfy all three of the above procedural prerequisites prior to attempting to assert the defense. One suggestion is to keep a log of all phone reports to the EPA so that one may later show that the EPA was contacted within 24 hours of any particular incident.

- f. Summary of OCS NPDES Regulatory Program. The EPA divided the petroleum industry into offshore, onshore, coastal, beneficial use, and stripper categories. 40 C.F.R. Part 435. BPT-based (Best Practicable Control Technology currently available) regulations were promulgated in 1979 for the offshore and coastal oil & gas extraction point source categories. 40 C.F.R. 435 Subparts A and D. The regulations limit discharges for oil and grease in deck drainage, drilling muds, and drill cuttings to "no discharge of free oil." 40 C.F.R. §§ 435.12(b) and 435.42(a). For produced water the EPA regulations established oil and grease effluent

limitations of 48mg/liter monthly average or 72mg/liter maximum daily average. 40 C.F.R. § 435.12(b).

The term "discharge" includes "any addition of any pollutant (excludes sewage and substances injected into a well) or combination of pollutants to waters of the United States from any point source." 40 C.F.R. § 122.2(a).

The EPA also published various analytical methods acceptable for ascertaining the oil and diesel oil content in drilling wastes. 53 Fed. Reg. 41,356 (October 21, 1988); 54 Fed. Reg. 634 (January 9, 1989).

- i. 1987 CWA Amendments. The EPA has proposed pursuant to the 1987 amendments to the CWA for the offshore category standards to regulate development through technology-based BAT standards, 33 U.S.C. § 1314(b)(2)(B), and New Source Performance Standards (NSPS standards) governing discharge of drill cuttings and drilling fluids. 53 Fed. Reg. 41,357 (October 21, 1988), as corrected by 54 Fed. Reg. 634 (January 9, 1989).
- ii. Proposed No Free Oil Standard. The EPA proposes under the BAT and NSPS guidelines to prohibit detectable amounts of free oil in drilling fluids, deck drainage, drill cuttings, produced sand, and well treatment fluids. Also the discharge of oil- or diesel-based drilling fluids and diesel contaminated drill cuttings would be verboten. This may possibly include requiring the injection offshore of produced water from all new or revised OCS facilities.

Note however that the MMS already prohibits use of *any* petroleum-based substance in a drilling mud system without prior approval of the District Supervisor. 30 C.F.R. § 250.40(b)(1).

Even if use is approved by the MMS, failure of the EPA toxicity tests is a permit violation. This constitutes a small "hidden reef" in the area of offshore pollution control.

- iii. The EPA proposes to limit amounts of mercury and cadmium in discharged drilling fluids (these elements usually appear in the barite component of drilling fluids).
- g. NPDES General Permit for the Gulf of Mexico OCS. 51 Fed. Reg. 24,897 (July 9, 1986). NPDES Permit No. GMG 280000 establishes effluent limitations, prohibitions, reporting requirements and other conditions on discharges from oil and gas facilities in federal waters conducting exploration, development and/or production operations. Note: the permit does *not* cover discharges into territorial seas of adjacent states, or coastal or onshore categories. (Note: the EPA Region VI office as of July 1989, prepared various draft Onshore General NPDES Permits and sent the draft permits to the EPA Headquarters for review. The draft Permits cover onshore wells that discharge into coastal waters. Certain of the proposed State permits were published in August, 1989. See section N *infra* for further discussion.)
 - i. See 40 C.F.R. § 125.120 for the EPA's ocean discharge criteria applicable to all NPDES permits for discharges into the contiguous zone, territorial seas, or the oceans.
 - ii. General Permit Coverage. Lessee must notify the EPA to be covered by the General Offshore NPDES Permit (if applicable to specific OCS area) 14 days prior to commencement of discharges at facilities.
 - iii. Individual Permit. Lessee may also seek an individual NPDES Discharge Permit for any facility located on the OCS.
 - iv. NPDES Permits as discussed previously establish specific standards, concentrations, and limitations for each category of discharge.
 - v. Types of discharges covered by the NPDES Offshore General Permit: Drilling Muds, Drill Cuttings, Deck Drainage, Produced Water, Produced Sand, Sanitary Wastes, Domestic

Wastes, Miscellaneous Discharges, Well Treatment and Test Fluids, Rubbish, Trash, and other Refuse.

Note, however, Section 402(1), (2) of the Water Quality Act (revisions to the CWA) prohibits the EPA from requiring an NPDES permit for discharges of storm water runoff from . . . oil and gas exploration, production, processing, treatment operations, or transmission facilities which are composed entirely of flows from systems used for collecting storm water runoff and which are not contaminated by, or do not come in, contact with any production or waste products located on the site. 33 U.S.C. § 1342(L)(2) (1988).

- vi. Solid Floating Wastes vs. Solid Sinking Wastes. Note that the current Gulf of Mexico general NPDES permit prohibits discharge of floating solid wastes and garbages by vessels and fixed or floating platforms, but allows sinkable wastes to be discharged unless they are otherwise specifically prohibited. Annex V of MARPOL 73/78 specifically prohibits the discharge of certain sinkable wastes. 33 U.S.C. §§ 1901-1911; 46 U.S.C. §§ 3306, 4104, and 4302; 49 C.F.R. § 1.46.

Materials Lost Overboard. The MMS requires each OCS Lessee or operator to record any materials lost overboard in its platform operations logbook and to report the loss to the District Supervisor. 30 C.F.R. § 250.40(d).

- vii. Annex V. The Act to Prevent Pollution from Ships requires the U.S. Coast Guard to administer and enforce the various Annexes of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78), concluded in London on February 17, 1978.

Annex V of MARPOL 73/78, "Regulations for the Prevention of Pollution by Garbage from

Ships" aims to reduce the discharge of ship-generated garbage into the marine environment. Annex V focuses particularly on the discharge of plastics, including synthetic fishing nets and other similar nonbiodegradable debris.

On December 29, 1987, the President signed Public Law 100-220, including Title II, known as the "Marine Plastic Pollution Research and Control Act of 1987." The Act provided authority to implement Annex V of MARPOL 73/78, effective December 31, 1988. The treaty also entered into force world-wide on December 31, 1988.

- viii. The Refuse Act, 33 U.S.C. § 407 (1988). Additionally the Refuse Act makes it a crime, without a permit, to discharge or suffer the depositing of any refuse matter or any material of any kind, into the navigable waters of the United States, its tributaries, or banks, whereby navigation may be impeded or obstructed, punishable by a fine of \$500 to \$2500. *Id.* See also 33 C.F.R. § 151.59(c)(ii).
- h. MARPOL 73/78 Interim Final Rules. The U.S. Coast Guard published interim final rules to implement Annex V of MARPOL 73/78. 53 Fed. Reg. 43,621 (October 27, 1988), 54 Fed. Reg. 18,384 (April 28, 1989). 33 C.F.R. Parts 151, 155, and 158. Given that the interim regulations implement an international treaty, the final regulations will likely be little changed.
 - i. General Rule - Platforms and Support Vessels. Interim regulation 33 C.F.R. § 151.73 prohibits discharge of garbage from mobile drilling units, and platforms as well as ships located within 500 meters thereof based on the type of garbage and proximity to land. See Appendix A in the interim regulations for the comprehensive requirements. 54 Fed. Reg. at 18,406.
 - ii. "Garbage." Basically, all offshore platforms and support vessels are prohibited from discharging garbage generated in the normal course of

operations, except dishwater and graywater. 33 C.F.R. § 151.05. That includes plastics, floating packing materials, dunnage, liners, paper, rags, glass and metal bottles, and food wastes, except that platforms and vessels more than 12 nautical miles from the nearest land may discharge unground food wastes. Platforms and vessels more than 3 nautical miles from the nearest land may discharge food wastes if compacted or ground into pieces smaller than one square inch in diameter. 33 C.F.R. § 151.73(b). *See* Appendix A, 53 Fed. Reg. 43,621 (October 27, 1988).

iii. General Rule - Ships. "No person on board any ship to which this subpart applies [barges on inland waterways and warships are excluded 33 C.F.R. § 151.09(b) and 33 C.F.R. § 151.51(a)] may discharge garbage into the navigable waters of the United States." 33 C.F.R. § 151.66.

i. Prevention of Pollution from Ships - Refuse Record Keeping and Waste Management Plans. In an ongoing process to implement Annex V of MARPOL, the U.S. Coast Guard recently issued interim final rules which required that all fixed and floating platforms, and all manned oceangoing U.S. vessels over 40 feet in length develop and maintain waste management plans. 33 C.F.R. Part 151; 46 C.F.R. Part 25; 54 Fed. Reg. 37,084 (September 6, 1989); 55 Fed. Reg. 18,578 (May 2, 1990).

The U.S. Coast Guard also deleted a requirement to maintain a Refuse Record Book issued by the local Coast Guard Marine Safety Offices. 33 C.F.R. § 151.55.

The purpose of the recordkeeping and reporting requirements is to provide a basis for training and garbage management, and prevent (not reduce) "the discharge of plastics, including synthetic fishing nets, and other debris which persist in the marine environment." *Id.* at Section I. "Background" at 54 Fed. Reg. 37,084; *see also* 55 Fed. Reg. at 18,580 "Waste Management Plans."

L. Proposed General Demonstration NPDES Permit-Central and Western Gulf of Mexico

The EPA Region VI Office has proposed the issuance of a general demonstration discharge permit. 54 Fed. Reg. 42,335 (October 16, 1989). The EPA proposed the permit in order to obtain information about use of thermal treatment and solvent extraction technologies in treating drill cuttings from oil-based drilling fluids. The EPA is studying the technologies for their possible use in eliminating the discharge of free oil from such cuttings.

Currently the General NPDES Permit for the Gulf of Mexico prohibits the discharge of cuttings from oil-based muds. While not revising that BCT-based standard, the EPA hopes substantially to reduce the volume of cuttings from oil-based muds that must be barged to shore for disposal.

Prior to the 1986 or current version of the Gulf of Mexico General NPDES Permit, the EPA allowed the overboard disposal of washed drill cuttings separated from oil-based drilling fluids. Apparently the porous nature of drill cuttings caused the cuttings to release oil into the water many months after disposal.

The EPA has already issued two individual demonstration permits to Conoco for application of thermal and solvent extraction technologies. *Id.* at 42339. Based upon some favorable preliminary results under the individual Conoco permits the proposed General Permit will authorize up to 20 additional experiments under similar conditions and restrictions.

Under the proposed demonstration permit the conditions of the current General Permit would apply except as follows: discharge of cuttings from oil-based drilling fluids would be authorized subject to (a) a weight limitation upon oil content of treated cuttings; (b) a toxicity limit; and (c) a no discharge of free oil limitation as measured by either the visible sheen or static sheen test, as applicable. *Id.* at 42343.

Additionally the EPA would limit oil and grease levels in the condensed water that is discharged, and would also prohibit discharge of any condensed hydrocarbons.

The technology appears to be a promising method to limit barging costs for oil-based drill cuttings, especially for drilling operations located far offshore.

M. The Shore Protection Act of 1988: 33 U.S.C. §§ 2601-2623

1. As a result of a series of well publicized incidents of medical and other wastes floating onto east coast beaches in the Summer of 1988 Congress passed the Shore Protection Act. 33 U.S.C. § 2603(a)(1) requires "[T]he owner or operator of the waste shall take all reasonable steps to assure that all municipal or commercial waste is loaded onto a vessel in a manner that assures that waste deposited in coastal waters is minimized."
2. Application. The U.S. Coast Guard has issued an interim rule interpreting and enforcing the law. 54 Fed. Reg. 22,546 (May 24, 1989). Only vessels which are hired to transport waste for a specific voyage must obtain a permit. The permit requirements do not apply to vessels which transport or generate waste incidental to their primary purpose of transporting cargo. *Id.* at 22546-47.

N. Discharges into Territorial and Coastal Waters

1. Proposed NPDES Onshore General Permits. The EPA has proposed NPDES general permits for facilities in four states in the Onshore Subcategory of the Oil and Gas Extraction Point Source Category. 40 C.F.R. Part 435, Subpart C. The States of Texas and Louisiana are included in this group. 54 Fed. Reg. 35,930 (August 30, 1989). The permits may have some effect upon offshore activities.

- a. Proposed Rule. Both general permits prohibit direct discharges of pollutants from oil and gas facilities, including wells and appurtenant facilities such as mud pits, separators, and reserve pits into the waters of the United States. Part I.

"Pollutants" include drilling fluids, produced water, drill cuttings, produced sand, deck or floor drainage, blowout preventer fluid, well treatment fluids, completion and workover fluids. Part II.

Disposal of wastes derived from oil and gas activities (located anywhere, including the OCS) into such waters is *not* covered by the proposed permits. A party must obtain an individual NPDES permit to dispose of pollutants into the above waters. Under sections 301

(b)(1)(C) and 401 (a)(1) of the CWA, the EPA may not issue such a permit until the relevant State grants or waives certification to ensure compliance with applicable State water quality standards.

- b. Applicability. The "Onshore" subcategory includes inter alia "marine waters located landward from the inner margin of the territorial seas." This would include shorebases which support OCS operations if reserve pits or disposal operations occurred there. Part III, Section F(6).
 - c. Reporting Requirements. Both general permits require a permittee to report any incident of noncompliance, including bypasses and upsets (as defined in Part III, Section F), orally within 24 hours that the permittee knows of the incident, followed within five days by a written report. The only exception is for toxic substances, for which the permittee shall notify the Regional Administrator of the EPA as soon as any change in permitted discharge or unpermitted discharge occurs. 40 C.F.R. §§ 122.42(a)(1) and (2).
2. Proposed NPDES Louisiana and Texas General Coastal Permits. The EPA recently proposed a separate general NPDES permit to regulate discharges from existing facilities in the Coastal Subcategory of the Oil and Gas Extraction Point Source Category in Louisiana and Texas, respectively. 40 C.F.R. Part 435, subpart D. 55 Fed. Reg. 23,348, 23377 (June 7, 1990).
3. State Regulation Not Preempted. As noted above, the CWA does not preempt a state's authority to regulate point source discharges which originate in state waters. The EPA may not issue an NPDES Permit until the state in which the discharge will originate grants or waives certification to ensure compliance with applicable state water quality standards or limitations. 33 U.S.C. §§ 1251(g) and 1311(b)(1)(C). See also the EPA pronouncement at 55 Fed. Reg. 26,201 (June 27, 1990) on court review of state individual control strategies.
4. Louisiana. For example, the Louisiana Department of Environmental Quality has jurisdiction over point source discharges under the Louisiana Water Control Law. La. R.S. 30:2071-2078. Thus, discharges into territorial or coastal

waters in Louisiana require *both* a federal NPDES *and* a state water discharge permit.

Louisiana has proposed a general discharge permit for the Territorial Seas. Although the proposal contains extensive sampling, reporting, and recordkeeping requirements, the State has recently indicated that the proposed permit may not be promulgated and that the State will continue to issue individual fieldwide permits instead.

5. Item of Potential Future Concern: The NPDES Surface Water Toxics Control Program. Section 304(l) of the CWA requires states to identify those waters that are adversely affected by toxic, conventional, and non-conventional pollutants. Then the states must prepare "individual control strategies that will control point source discharges of toxic pollutants." 40 C.F.R. Parts 122, 123, and 130. *See also*, 54 Fed. Reg. 1302 (January 12, 1989); 54 Fed. Reg. 23,868 (June 2, 1989). The individual states' future development of these federally-mandated control schemes may impact shore-based support activities of OCS development.

O. Onshore Disposal of OCS Exploration and Production Wastes (E&P Wastes)

Summary. An OCS Lessee may also choose to dispose of wastes generated offshore at onshore sites, *e.g.*, drilling fluids, cuttings, separator sludge, and produced sand, etc. However prior to any such disposal an OCS Lessee should take heed of the EPA's revised policy for cleanup of hazardous wastes under the CERCLA. 42 U.S.C. § 9605-9675 (Supp. V, 1987). In the 1980's after the CERCLA's passage, the EPA focused its CERCLA enforcement activities on waste sites generated by the chemical industry. Now however the EPA has expanded the scope of enforcement activity to include waste sites which contain oilfield exploration and production wastes. The CERCLA excludes petroleum and natural gas from the definition of hazardous substances. 42 U.S.C. § 9601(14). However the exemption does not by its terms exempt wastes associated with oil and gas exploration and production activities. In addition, the EPA's new Toxic Characteristic Leaching Procedure test has expanded the range of organic chemicals, metals, and pesticides which are specifically listed as hazardous substances. 55 Fed. Reg. 11,798 (March 29, 1990). Thus, the CERCLA activity involving the oil and gas industry will likely arise.

1. Federal Regulation of Exploration and Production (E&P) Wastes. The RCRA, 42 U.S.C. §§ 6901-6991, the primary federal law which regulates disposal of solid and hazardous wastes, exempts many oilfield wastes such as produced waters, drilling muds, and treatment fluids from the definition of hazardous wastes. See the exploration, development, or production waste exemption under the RCRA. 42 U.S.C. §§ 6921(2)(A) and 6982(m). Note also that the EPA in 1988 delisted separator sludge as a hazardous waste. 53 Fed. Reg. 37,759 (1988).

However, the RCRA exemption for E&P wastes does not necessarily exempt those same wastes from regulation under the CERCLA if the wastes contain substances identified as hazardous under any of the other laws through which the CERCLA defines hazardous substances.

In a related fashion one may argue that since the RCRA exempts mining wastes (*e.g.*, slag from copper mining) from regulation, then mining wastes cannot be hazardous under the CERCLA. Note that one influential court ruled on the factual situation that the presence of small quantities of substances which are designated as hazardous under statutes other than the RCRA cause the particular mining wastes to be classified as a hazardous waste under the CERCLA. *Eagle-Picher Industries v. U.S. Environmental Protection Agency*, 759 F.2d 923 (D.C. Cir. 1985).

The same rationale is equally applicable to E&P wastes. That is, the EPA may contend that certain constituents in drilling mud or treatment fluids are hazardous. Thus the overall mixture may not fall within the RCRA's E&P wastes exemption and the CERCLA's strictures may become applicable to E&P wastes, thereby potentially subjecting the generator of those wastes to the CERCLA enforcement activity. (Glycol tower condensation contained in overboard discharges of produced water is one example).

The EPA has already partially adopted this position in relation to E&P Wastes. The EPA has attempted to limit the E&P Wastes exemption by distinguishing between hazardous substances which are present in petroleum and crude oil products versus hazardous substances which have been added. 50 Fed. Reg. 13,460 (April 4, 1985).

2. CERCLA. The CERCLA enacted on December 11, 1980, sweeps more broadly in its scope than the RCRA. The RCRA is limited to regulation of solid wastes, including the subset of hazardous wastes. The CERCLA on the other hand, deals with the release of "hazardous substances" and not just hazardous wastes into the environment. Its principal focus is past waste management practices, spills, and releases involving hazardous substances.

Liability. The CERCLA imposes liability on four classes of parties for certain costs or damages arising from releases or threatened releases of a hazardous substance. 42 U.S.C. § 9607. Those categories include "generators" of the hazardous substance - i.e., anyone who arranged for disposal or treatment of a hazardous substance at a third party's facility. 42 U.S.C. § 9601. Exploration and production companies will likely fall within this category of "potentially responsible persons" (PRPs) if affected by the CERCLA enforcement action.

The standard of liability for a PRP is the same as that under Section 311 of the CWA or strict liability. Due diligence is not a defense. Once the EPA has met its burden of proof, a generator may only avoid liability if it affirmatively establishes that the sole cause of the release of the hazardous substance was an act of God, act of war, or the act of a third party with whom the generator did not have even an indirect contractual relationship. 42 U.S.C. § 9607(a).

Even of more concern for the oil and gas industry, decisions under the CERCLA involving multiple defendants consistently hold that joint and several liability may be imposed in appropriate circumstances. *See e.g., United States v. Monsanto*, 858 F.2d 1060 (4th Cir. 1988). Thus a PRP who contributed only 2% of the substances present at a facility could theoretically be liable for 100% of the cleanup costs. While a right to contribution from other generators may exist, 42 U.S.C. § 9613(f), that right may be of no value against generators who are bankrupt and defunct, a problem in the post-1986 crash oil & gas industry.

3. RCRA. The RCRA was enacted in 1976 as an amendment to the Solid Waste Disposal Act. 42 U.S.C. §§ 6901-6991. The RCRA was similar to the NPDES Program under the CWA in that the law created a program of federal standards with state implementation to control the management of hazardous

wastes from generation to disposal. As previously noted, some oil and gas wastes are excluded from regulation under the RCRA as hazardous wastes. 42 U.S.C. § 6982(m); 40 C.F.R. § 261.4(b). Still certain points about the RCRA and about the exclusion should be noted as oil and gas operators may utilize substances which may be considered a "hazardous waste" under 40 C.F.R. Parts 261 and 262.

- a. **Small Quantity Generator of Hazardous Wastes.** Before discussing the E&P Waste exemption under the RCRA it is important to note that production platforms or drilling rigs may generate small quantities of hazardous wastes which are *not* exempted from regulation under the RCRA. Thus a drilling rig or production platform may fall within the RCRA definition of a "small quantity generator" of hazardous wastes and may be required to obtain an i.d. number and manifest waste shipments onshore. 40 C.F.R. § 262.12(a).
- b. **E&P Wastes Exemption.** Congress in passing the RCRA mandated the EPA in 1976 to classify solid waste materials as either hazardous or non-hazardous. Congress however currently exempted E&P Wastes from regulation under the Subchapter as hazardous waste. 42 U.S.C. § 6982(m).

Used Oil. In *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (Ct. App. D.C. 1988), the court ruled that the EPA's decision not to list recyclable used oil as a hazardous waste simply on the basis of potential stigmatic effects was contrary to law because the RCRA section 3001 does not permit such effects to be considered. The Court remanded the issue to the EPA for reconsideration. The EPA expects to promulgate some standard by July 1990. 54 Fed. Reg. 45,307 (October 30, 1989).

Offshore, used oil is usually disposed of by putting it directly into the oil sales line.⁶ Should the EPA classify used oil as a hazardous waste, offshore operators may need to reconsider this disposal method. See 40 C.F.R. § 261.6(a)(3)(vi).

- c. Length of Exemption. The E&P wastes exemption was not permanent. Congress mandated that the EPA study the E&P Waste exemption issue and report back to Congress. In December 1987, the EPA concluded in its report to Congress that when managed in accordance with state and federal requirements, exempted oil and gas wastes rarely pose significant threats to human health and the environment. "Report to Congress, Management of Waste from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy." Environmental Protection Agency, December 1987, 1D EPA/530-SW-88-003. See generally Flannery, *The Environmental Regulatory Dilemma of the Oil & Gas Industry*, 9 East. Min. Law Found. at 15.02 (1988).

The EPA also concluded that existing regulations were generally adequate to regulate disposal of drilling muds, cuttings, produced water, and certain associated wastes and that wastes from the exploration, development, and production of oil and gas should not be regulated under Subtitle C the hazardous wastes section of the RCRA. 53 Fed. Reg. 25,446 (July 6, 1988).

However, the EPA noted that there were gaps in current waste disposal regulations which the EPA intended to fill as follows:

- i. Regulate at least some E&P Wastes under the RCRA Subchapter IV non-hazardous solid waste disposal regulations, and make concomitant revisions in the CWA and Safe Drinking Water Act Programs; work with and encourage states to improve state programs regulating E&P Wastes; seek additional authority from Congress to regulate certain practices such as landfarming and road spreading of high-volume wastes, design and maintenance of disposal pits, and associated waste disposal.
- ii. Solid Wastes. Note that the RCRA definition of solid wastes is very broad including materials that are "solid, liquid, semisolid, or contained in gaseous material." 42 U.S.C. § 6903(27).

- iii. CWA Regulated Substances Excluded. Note also that industrial point source discharges regulated under an NPDES permit issued pursuant to the CWA are excluded from the RCRA definition of "solid wastes." *Id.*
- iv. Toxicity Characteristic Leaching Procedure Regulations. Summary of the RCRA establishes various methods of ascertaining whether a particular substance is hazardous within the meaning of the statute and therefore subject to Subtitle C's more stringent treating, storage and disposal regulations. 42 U.S.C. §§ 6901-6991. Toward that goal, the EPA has created a list of substances which are considered hazardous substances. 40 C.F.R. § 302.4. However, the EPA also requires any other substance exhibiting certain characteristics such as toxicity, ignitability, corrosivity, or reactivity to be classified as a hazardous substance. RCRA Section 3001(a). To that extent, the EPA recently published final regulations which created a new test to ascertain the potential of substances to leach specific concentrations of toxic constituents. 55 Fed. Reg. 11,798 (March 29, 1990), *to be codified at* 40 C.F.R. Parts 261 and 271. The Toxicity Characteristic Leaching Procedure or (TCLP) regulations also added 25 additional organic chemicals to the EPA list of hazardous substances, and proposed chronic toxicity reference levels for the substances.
- v. Conflict Between the RCRA Chronic Toxicity Reference Levels and the CWA NPDES Permit Effluent Guidelines and Pretreatment Standards. In the preamble to the final regulations the EPA noted that in many cases the proposed toxicity reference levels in the TCLP regulations "are lower than the concentrations allowed in wastewaters directly discharged to surface waters in compliance with NPDES effluent guidelines." Most of the commenters argued that it would be difficult to justify labeling a wastewater as 'hazardous' under the RCRA, but 'safe' under

the CWA." 55 Fed. Reg. 11,798, 11,837 (March 29, 1990).

The EPA disagreed citing the different statutory goals, bases and purposes of the RCRA and the CWA. *Id.* Indeed, as noted above, discharges regulated pursuant to an NPDES Permit are excluded from the RCRA definition of a "solid waste." 42 U.S.C. § 6903(27). While the EPA position probably properly distinguishes the RCRA's management of land-based hazardous wastes from the CWA's regulation of direct discharges into navigable waters, look for at least some pressure from interest groups on the EPA to coordinate these regulatory standards.

4. Scope of the RCRA Petroleum Industry Exemption for E&P Wastes. The EPA stated that the following wastes are included within the exemption: produced waters, drilling fluids, drill cuttings, rigwash, drilling fluids and cuttings from offshore operations disposed of onshore, geothermal production fluids, well completion treatment and stimulation fluids, packer fluids, BS&W and other tank bottoms from primary production operations, accumulated materials such as hydrocarbons, solids and sands from separators, pipe scale, waste crude oil, fluid treating vessels and impoundments, pit sludges, well and cooling tower blowdown wastes, produced waste gases, subsurface gas storage wastes, and workover and gathering line pigging wastes. 53 Fed. Reg. 25,446 at 25,453 and 54 (July 6, 1988).
5. Wastes Which are *Excluded* from the E&P Waste Exemption. The EPA has either ruled or stated that the following wastes do *not* fall within the scope of the E&P waste exemption; If any of these wastes contain "hazardous wastes" within the scope of Subtitle C of the RCRA, then they will be subject to the RCRA regulation: unused acid/fracing fluids, gas plant cooling tower cleanant, vacuum truck/drum rinsate, crude oil reclaimer wastes, compressor oil/filters/blowdown, boiler cleaning plates, boiler refractory bricks, boiler scrubber fluids/sludges/ash, radioactive tracer wastes, drums, insulation, transportation-related pipeline wastes, painting, service company and refinery wastes, used lube oil and hydraulic fluid, waste solvents, caustic/acid cleaner, laboratory wastes, incinerator ash, sanitary wastes, and pesticide wastes.

6. Mixture Rule. Commingling solid wastes with either a listed hazardous waste or a waste exhibiting one of the four RCRA hazardous waste characteristics is itself a hazardous waste. 40 C.F.R. §§ 2611.3(a)(iii) and (iv).
7. State Regulation of E&P Wastes. The EPA's determination not to regulate E&P Wastes as "hazardous wastes" does not free a Lessee from scrutiny under state disposal laws. 42 U.S.C. §§ 6929 and 6941.

- a. Underground Injection Control ("UIC") Programs. State regulation varies for disposal by injection well. Under the Safe Drinking Water Act, states with the EPA's approval may assume "primary enforcement authority" of waste disposal well injection activities. The EPA is currently reviewing the issue and may publish new UIC base guidelines in 1989. *See e.g.* Texas Railroad Commission Rules §§ 9, 46, and 74 (regulation and monitoring fluid injection wells).

- b. Reserve Pits. Some states require all new disposal pits to be lined. Louisiana, for example, requires pits to be registered and tested before closure. The Louisiana Legislature also recently adopted a measure requiring all oil and gas production pits in inland tidal waters, lakes bounded by the Gulf of Mexico, and salt water marshes to be closed by January 1, 1991, or by January 1, 1993, based upon a clear showing of no current harm to the adjacent resources and water quality.

Texas currently has no similar comprehensive closure requirements although Texas does prohibit storage of crude oil and crude oil products in pits and also requires permits prior to disposal or storage of most oil field wastes in pits. Texas Railroad Commission Rules 8(d), 9, and 46.

- c. Some states oil and gas agencies have authority over portions of the E&P Waste disposal programs. Certain states such as Louisiana and California have more stringent regulations than the federal disposal regulations, for example, classifying drilling fluid wastes. The mud system used offshore is not used in land-site disposal. State regulations focus on the concentration of salts, hydrocarbons, and heavy metals found in mud

additives or an accumulation of these substances in waste pits.

Texas on the other hand, through its Solid Waste Disposal Act, interprets its exclusion of oil and gas-related wastes from the hazardous waste management program very broadly. Tex. Rev. Civ. Stat. 4477-7.

- d. **Air Emission Rules Violations.** On June 8, 1989, the Texas Air Control Board (TACB) cited Texaco USA for excess emissions as a result of a spill of 100 barrels of oil mixed with 300 barrels of water from a saltwater transfer line. The TACB characterized the spill as a "major upset" resulting in an "excessive emission that contravenes the intent of the Texas Clean Air Act or regulations of the Board." This is a novel attempt to extend the definition of a "major upset" to failure of equipment other than air pollution control equipment. While not directly applicable to disposal of OCS wastes onshore, the dispute reflects the potential regulatory swamp that may afflict the disposal of OCS wastes onshore.
8. **Precautions in Onshore Disposal of Offshore - Generated E&P Wastes.**
- a. **Preferably dispose of E&P Wastes offshore.** However, if onshore disposal is desired or required:
 - i. **No Commingling of Wastes.** Segregate E&P Wastes from other wastes prior to disposal. Commingling may drag the Lessee into a subsequent CERCLA "Superfund" action requiring cleanup of the disposal area in question.
 - ii. **Test Pits Before Closure.** Louisiana regulations already require disposal pits to be registered and tested before closing. Lessee should conduct similar tests on *all* pits wherever located and preserve the pit closure records as a shield against future liability. The costs of a few basic soil tests, bore holes and photographs are actually quite inexpensive, usually under \$10,000.

- b. Sample State Environmental Regulatory Structure. Shown below is the jurisdictional structure for environmental issues in the state of Texas. A brief review of the following quickly suggests why offshore disposal of E&P Wastes may be the lesser of two evils.

State of Texas Jurisdiction

Air: Texas Air Control Board, Texas Water Commission (for air emissions from hazardous wastes facilities)

Surface Water:

Texas Water Commission, Texas Parks and Wildlife Department, Texas Department of Health, Texas Water Development Board, and various river authorities.

Groundwater:

Texas Water Commission, Texas Water Development Board, Texas Department of Agriculture, Railroad Commission of Texas, Texas Parks and Wildlife Department, Texas Department of Health, Soil, and Water Conservation Board.

Solid Waste:

Texas Department of Health (Municipal), Texas Water Commission (Industrial), Texas Air Control Board.

Hazardous Wastes:

Texas Water Commission, Texas Air Control Board.

Radiation Control:

Texas Department of Health, Texas Water Commission.

Moreover, each of the above agencies have developed their own procedures and policies, many of which are unwritten.

9. EPA and State Roles in the RCRA and the CERCLA. For a discussion of the conflicting and overlapping demarcation lines

of federal and state jurisdiction in hazardous waste disposal issues, see Chambers and Gray, *EPA and State Roles in RCRA and CERCLA*, Natural Resources and Environment, Volume 4, Number 2 (Summer 1989).

10. Superfund Amendments and Reauthorization Act of 1986 (SARA) Title III and the OSHA Benzene Standard. Neither SARA's Title III reporting requirements nor the Occupational Safety and Health Act's worker benzene exposure standards appear applicable to offshore OCS operations. See the 42 U.S.C. § 11049 definition of a "facility" and also 29 C.F.R. § 1910.1028(a)(2)(vi). Nonetheless, one may wish to consider including some training on the hazards of exposure to Benzene for workers offshore on both vessels and fixed facilities.

In addition, the U.S. Coast Guard under its authority to regulate the exposure of marine personnel to hazardous chemicals, is currently drafting rules which would lower occupational exposure limits for benzene. CGD 88-040. 55 Fed. Reg. 25,401 (June 21, 1990).

- a. Onshore/Offshore Disposal of Dredged and Fill Material. Summary of Program. Discharging dredged or fill materials into navigable waters is prohibited except pursuant to a permit issued by the COE or an approved state for certain waters in certain circumstances. 33 U.S.C. § 1344. States have the option of administering section 404 dredge and fill permit programs for waters other than those used in interstate or foreign commerce and the wetlands adjacent thereto. 33 U.S.C. § 1344(g). The EPA must approve any such program. 33 U.S.C. § 1344(h); 40 C.F.R. § 233. Thus, offshore disposal probably will not run afoul of any State program, and onshore disposal near shorebases is most likely still subject to federal regulation.

"Dredged materials" are defined as materials excavated or dredged from the waters of the United States. "Fill materials" are defined as any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body. 33 C.F.R. § 323.2(c) and (e).

Onshore under section 404 of the CWA, the EPA and COE are jointly responsible for establishing a wetlands permitting program to regulate the discharge of dredged and fill material into "wetlands". 33 U.S.C. § 1344; 33 C.F.R. § 328.3(a). The COE still issues the actual permit. 33 U.S.C. § 1344(a). However, sites for disposal of dredged or fill materials must meet the requirements established by the EPA. 33 U.S.C. § 1344(b); 40 C.F.R. § 230. The EPA may limit or deny use of any site where the EPA concludes that the discharge would have an unacceptably adverse effect on the environment. 33 U.S.C. § 1344(c); 40 C.F.R. Part 231.

In 1977 the EPA issued the "Green Book". The book offers testing protocol intended to help parties obtain dredging permits. Note that the EPA will shortly issue a revised version of the "Green Book." The book will help identify with better accuracy the biological effects of dredged material on many species.

- i. "Wetlands" include swamps, marshes, bogs, and forest wetlands. *See e.g.*, 40 C.F.R. § 435.41(f).
- ii. "No Net Loss." On January 18, 1989 the EPA proposed a Wetlands Action Plan which adopts a policy of no net loss of remaining wetlands and commits the EPA and COE to restore already damaged wetlands where feasible. In fact, in early December, 1989, the EPA and COE released a final Memorandum of Agreement (MOA) Concerning Mitigation Under the CWA Section 404(b)(1) Guidelines, implementing the Administration's goal of no overall net loss of wetlands. *See* Appendix C. The MOA includes the concept of compensatory mitigation (restoration of degraded wetlands or creation of additional wetlands) and will likely be hotly debated by diverse coastal interest groups such as the energy industry, the environmentalists, the Eskimos, and many other groups who are active in the coastal areas of the United States.

While final, the MOA has been temporarily sidelined in order for the Administration to

consider certain protests to the "no net loss" policy.

Thus, the impact of the new policy on the petroleum industry will be unclear for some time.

- iii. Dredge and Fill Permit Program. There are two classes of permits: individual permits which are issued for a single project on a case-by-case basis, 33 C.F.R. § 323; and general permits which are issued on a regional or national basis for categories of activities that have minimal individual or cumulative impact on the environment. Those activities which are covered by general permits appear at 33 C.F.R. § 330.
- iv. Applicability. Is there a "discharge of dredged or fill material into waters of the United States?" "Discharge" is defined as the addition of dredged or fill material into the waters of the United States. 33 C.F.R. §§ 323.2(d) & (f). The term includes specific discharges, as well as runoff or overflow from a contained land or water disposal area: i.e., a wide variety of land disturbing, draining, or construction activities carried out in or affecting these waters.

"Dredged or fill material" includes essentially any material deposited during any of the above operations, except waste discharges. Waste discharges are regulated pursuant to Section 402 of the CWA. 33 U.S.C. § 1342.

"Waters of the United States" reaches broadly to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds." 33 C.F.R. § 328.3(a)(3).

Under a "Memorandum of Understanding, Geographical Scope of the Section 404 Program" (April 1980), the COE has the primary authority to decide whether a project requires a Section

404 Permit. However, the EPA retains the bottom line authority for such decisions, and will intervene whenever significant issues or technical difficulties are presented. 33 U.S.C. § 1319(a)(3).

- v. Permit Process. The permit process is actually a five-step process. First, a party may engage in pre-application consultation where District COE staff advise the applicant of studies and information which is likely required for an agency decision. Note that the issuance of a section 404 dredge and fill permit is subject to NEPA scrutiny and therefore usually requires that an applicant submit either an environmental assessment or an environmental impact statement depending upon the extent of the environmental impact of the proposed activity. The EA or EIS is usually submitted simultaneously with the permit application.

Second, the applicant files the application on a government approved form. The COE will review the application and notify the applicant as to whether the application is complete. The COE then issues a public notice within 15 days of receipt of the completed application. The notice must contain sufficient information so as to allow the public to understand the nature and magnitude of the proposed activity. 33 C.F.R. § 325.3.

Third, a public comment period of 15 to 30 days duration follows. Comments are incorporated into the administrative record and also become part of the administrative decision-making process.

Fourth, the COE issues a two-part decision. A preliminary statement of findings, including any special conditions emanates first. Then the COE issues the final decision and forwards the permit to the applicant for signature. Note that the COE may legitimately consider such factors as the cost of various alternatives to the applicant

and logistical concerns in considering whether a particular site or alternative sites thereto are practicable. *Sylvester v. United States Army Corps of Engineers*, 882 F.2d. 407 (9th Cir 1989).

Fifth, special procedures must be considered if the permit application touches upon any of the following concerns: endangered or threatened species, State CZMA Consistency Plans, Section 401 Water Quality Certification, designated historic properties and similar issues under the National Historic Preservation Act, 16 U.S.C. § 470f-470w-6 (1982), and activities which are associated with federal projects.

- vi. Dredge and Fill Permits - Modification, Suspension, or Revocation of Current Permits. The COE actively oversees the Section 404 permit program. The local District Engineer may reevaluate a current permit at any time, either on his own initiative or at the request of a third party.

The District Engineer may conclude that revision of the original permit would best serve the public interest. He/She will seek revision first through informal negotiations with the permit holder. If no agreement is forthcoming, then the District Engineer may act to modify the permit. This includes suspending the permitted activity until the COE establishes and implements modifications.

- vii. Unauthorized Discharges. The CWA imposes strict liability for violations of the terms thereof, and contains provisions imposing both civil and criminal sanctions. 33 U.S.C. § 1311(a). The Secretary of the Army issues orders to prevent unauthorized discharges and also to ensure compliance with the terms of any permit issued by the COE under Section 404. 33 U.S.C. §§ 1344, 1413, and 401-467n; 33 C.F.R. Part 326. The COE's District Engineer will issue cease and desist orders to halt any additional work on an ongoing discharge activity that has not been

permitted. 33 C.F.R. § 326.3(c)(1). He may also order removal of unpermitted fill material. *Parkview Corporation v. Department of the Army*, 490 F. Supp. 1278, 1285 (E.D. Wis. 1980).

The EPA of course has its own enforcement authority under the Act, and can seek civil or criminal penalties independently of the COE. 33 U.S.C. §§ 1311, 1319.

The COE's regulations contemplate that the COE will coordinate with the EPA in carrying out any enforcement activity. 33 C.F.R. § 326.3(g).

- b. Ocean Dumping. Except for discharges from fixed platforms or structures and mobile drilling units pursuant to NPDES permits (and except for certain discharges under Section 13 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. § 407)), disposal of solid and liquid wastes into waters seaward of the baseline from which the territorial sea is measured is regulated by the EPA under section 102(c) of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA or Ocean Dumping or the Act). 33 U.S.C. § 1401-1445; 40 C.F.R. Part 228. The MPRSA prohibits transportation of material from the United States for the purposes of ocean dumping except as authorized by permit issued under the Act. Section 102(c) provides that the EPA may designate recommended sites and times for ocean dumping. *See e.g.*, 55 Fed. Reg. 3688 (February 2, 1990), for an EPA notice of removal of certain expired or terminated sites from the site designation list.

Site designations specify not only the latitude and longitude of the location, but also the duration of use and types of material that may be disposed of at the site. Dumping permits contain additional terms and conditions to ensure that the limitations established by the site designation are observed. 40 C.F.R. § 228.12.

Specific sites are designated by promulgation in 40 C.F.R. Part 228. In addition, there are two categories of sites: interim sites and approved sites. 40 C.F.R. §§

228.12(a) & (b). The distinction revolves around whether environmental studies have been completed thereon or whether the site was designated simply based upon historical usage.

On November 18, 1988, the Ocean Dumping Ban Act was enacted into law. Public Law 100-688; U.S. Code Cong. and Admn. News 5767. That Act amended certain portions of the MPRSA to prohibit the ocean dumping of sewage and industrial waste beyond December 31, 1991. The definition of "industrial waste," as "any solid, semisolid, or liquid waste generated by a manufacturing plant or processing plant" does not appear to include wastes generated by drilling operations or by offshore first stage extraction facilities. 33 U.S.C. § 1412a(b). Be aware however that the issue is unclear.

The EPA released the "Green Book" in 1977. The book contains testing protocol which is intended to help parties obtain dredging permits. A revised version of the "Green Book" will be released shortly and the revised version will also contain guidelines to help implement the ocean dumping regulations.

- i. Oil Spills and Sewage Excluded. Note also that the Ocean Dumping Act excludes oil spills and sewage from vessels from its coverage. 40 C.F.R. § 227.6(a)(4). Those two types of pollution are regulated under Sections 11 and 13 of the Federal Water Pollution Control Act, respectively. 33 U.S.C. § 1402(c); 33 U.S.C. §§ 1161 and 1163.
- ii. Site Designation. The EPA drafts an EIS, in conjunction with the COE if a dredged material site is involved, conducts an ESA biological assessment, and then designates sites where ocean dumping is permitted, including dredged materials. 33 U.S.C. § 1401; 40 C.F.R. Part 228. See 54 Fed. Reg. 50,619 (Dec. 8, 1989) for an example of designation of a dredged material disposal site in the Barataria Bay Waterway in the Gulf of Mexico.

- iii. Dumping permits are issued by the EPA for all regulated liquid and solid wastes, except dredged materials. 33 U.S.C. § 1412(a). The COE issues dumping permits for dredged materials. 33 U.S.C. § 1413.

States may propose to the EPA "criteria" regulating dumping into ocean waters under state jurisdiction (i.e., territorial waters) or "into other ocean waters to the extent that such dumping may affect waters within the jurisdiction of such state," if the EPA decides such "criteria" are not inconsistent with the purposes of the Act.

- iv. Solid and Liquid Wastes. For regulations covering application for and issuance of permits for ocean dumping of solid and liquid wastes, see 40 C.F.R. Parts 220-227.
- v. Dredged Materials. For regulations covering application for and issuance of permits for ocean dumping of dredged materials, see 33 C.F.R. Parts 320, 324, and 325.
- vi. Hazardous Wastes. Note that hazardous wastes may be disposed of offshore if a disposal barge or vessel has a permit for ocean dumping (40 C.F.R. Part 220) and also complies with certain RCRA hazardous waste regulations and permit requirements listed in 40 C.F.R. § 270.60. See also 40 C.F.R. § 227.7 for additional restrictions on Ocean Dumping of certain categories of waste. Failure to comply may result in the National Oceanic and Atmospheric Administration (NOAA) seeking damages to the natural resources under §105 of the CERCLA. See subsection Q *infra*.

11. Air Quality Regulations. 30 C.F.R. §§ 250.44-46.

- a. Summary. The OCSLA, as amended, requires the DOI (qua MMS) to ensure compliance with the national ambient air quality standards contained in the Clean Air Act, but only to the extent that OCS emissions significantly affect the air quality of any adjacent State.

43 U.S.C. § 1334(a)(8). Basically the MMS requires all POE and DPP Plans submitted or revised after June 2, 1980 to make certain findings relative to emissions from offshore facilities as follows. 30 C.F.R. §§ 250.45(a) and (c).

The MMS review process of air emissions from OCS facilities is a three step process. First, an OCS Lessee must submit an inventory of projected emissions from its facilities and compare the inventory with authorized emission levels. Those levels vary based upon the distance of the OCS facility from the shoreline. Facilities with emissions below the authorized standard are exempted from further review, unless those emissions in conjunction with emissions from other OCS facilities in the vicinity could cumulatively impact onshore air quality.

Next, the Lessee must use computer models to determine whether emissions will exceed significance levels. For all emissions except volatile organic compounds, the models employ local meteorological data to calculate the onshore impact of the projected emissions from the OCS facility. If the predicted concentration level is below the MMS' significance levels, then the facility is not required to control emissions.

Volatile organic compounds (VOCs), on the other hand, are regulated on an emission-based approach. Most VOCs emanate from valves, flanges, and pumping equipment through which oil or gas are processed or transported.

Finally, if necessary, the Lessee must determine which measures to implement in order to control emissions, and to mitigate emissions that exceed the significance levels in the relevant MMS regulatory section. The quantity of control and mitigation is dependent upon the air quality status of the adjoining onshore area - i.e., whether that state is currently attaining the National Ambient Air Quality Standard under the Clean Air Act.

If the emissions impact an attainment area, then the Lessee must install best available control technology

(BACT) to reduce emissions. If the emissions impact a non-attainment area, then the Lessee must not only install BACT, but must also either install additional control equipment or obtain credit for emission reductions elsewhere, on or offshore, in order to reduce the net emissions from the OCS facility to zero. The MMS has also proposed that special emission control requirements be applicable to OCS facilities off the coast of California as noted below.

- b. If the Director of the MMS determines emissions from an existing facility has potential to significantly affect air quality *onshore* of the State, then the owner of the existing facility is also subject to review, regardless of the date that POE or DPP plans were or are submitted. 30 C.F.R. § 250.45(b).
- c. Findings: 30 C.F.R. § 250.45(d) and 46(b), Exemption Formulas. A facility is exempt from further air quality review if the highest total annual quantities of Carbon Monoxide, Total Suspended Particulates, Sulfur Dioxide, and Nitrogen Oxides is less than a certain tonnage/distance to closest onshore area.
- d. Findings: Significance Levels; 30 C.F.R. §§ 250.45(e) and 46(c). For facilities that fail the exemption test in subparagraph (d), must determine through modelling if the projected emissions of any of the four substances named above surpasses the significance levels on either an annual or a daily basis.
- e. Significance Determination, 30 C.F.R. §§ 250.45(f) and 46(d): Any emission other than hydrocarbons which fails the above tests is then deemed automatically by this subparagraph "to significantly affect the air quality on the onshore area for that pollutant," and must be reduced via application of BACT.
- f. VOCs. Hydrocarbon emissions from *any* facility which is not exempt are deemed "to significantly affect the air quality of the onshore area for that pollutant." These emissions must be reduced through application of BACT; additional measures may be needed if the onshore area affected is an ozone nonattainment area.

U.S. Coast Guard Authority. Note also that the U.S. Coast Guard is currently drafting regulations to lower occupational exposure limits for benzene under its authority to regulate exposure of marine personnel to hazardous chemicals. 55 Fed. Reg. 25,401 (June 21, 1990).

- g. Temporary Facilities (i.e., drilling rigs): 30 C.F.R. § 250.45(h). A general requirement to reduce projected emissions which significantly affect the air quality of an onshore area of a state. *See also* 30 C.F.R. § 250.45(g)(2)(i).
- h. Monitoring. Lessee must monitor emissions from facility in a manner approved or prescribed by the MMS.
- i. Emission Offsets, 30 C.F.R. § 250.45(i). The Lessee may swap emission offsets of other facilities with offshore facilities if offsets reflect application of BACT, are equivalent, the appropriate air quality control jurisdiction has been notified, and the offsets come from sources that affect the same onshore area.
- j. Currently Exempt Facilities. The Regional Supervisor will also review any otherwise exempt facility to ascertain whether the facility, either individually or in combination with other facilities may significantly affect the air quality of an onshore area. 30 C.F.R. §§ 250.45(j) and 46(f).
- k. Proposed Emission Regulations - California OCS. 30 C.F.R. § 250.47. The MMS has proposed that special emission requirements govern OCS facilities located offshore of California. 54 Fed. Reg. 1846 (Jan. 17, 1989).

The proposed regulations regulate pollutants which are both inert and react photochemically to form ozone. The regulations also adopt BACT modeling and mitigation measures which are stricter than the EPA standards for similar facilities onshore.

Additionally, temporary sources of pollution, including construction equipment and drilling rigs, are treated as

stationary sources that must be mitigated. Mobile sources of pollution such as offshore supply vessels must be regulated when they are attached to a platform.

Also note that the proposal includes an equipment "upset" provision similar to the upset provision contained in the EPA's NPDES CWA regulations. 30 C.F.R. § 250.47(a)(9)(iii).

Structure of Proposed Regulations. The MMS proposes a four step regulatory process for facilities located on the California OCS.

First, the Lessee must install BACT on new sources of emissions associated with a new OCS facility, such as power generation equipment. 30 C.F.R. § 250.47(b); *see also* 54 Fed. Reg. 1870 (January 17, 1989). In addition, the Lessee must have installed "reasonably available control technology" (RACT) on existing emission sources which are associated with the new facility, such as supply boats. 30 C.F.R. § 250.47(b)(4). Furthermore, the Lessee must analyze the feasibility of utilizing electrical power generated onshore as a power source for the facility. 30 C.F.R. § 250.47(b)(3).

Second, the magnitude of any remaining emissions from the new facility must be reviewed. That includes estimating any emissions which the MMS classifies as toxic.

Third, if the above review dictates additional mitigation, then the type of additional mitigation will depend upon the quantity of emission increase and also upon whether a new or existing facility is involved.

Fourth, the MMS itself will occasionally assess the cumulative impacts on onshore California air quality from all OCS facilities, both new and existing, and decide whether even further controls are necessary. 30 C.F.R. § 250.47(a)(3).

1. Marine Vapor Control Systems and Storage Tanks. See also subsection P. 6 *infra* for recently published U.S. Coast Guard standards for vapor control systems which are required on tank vessel emissions (including loading

activities at offshore facilities) under the Clean Air Act by adjacent states in order to meet the EPA's national ambient air quality standard for ozone.

- m. Proposed Federal Legislation. HB 2323 would extend Clean Air Act jurisdiction to the OCS. That is, regulatory authority over OCS air emissions would be transferred from the MMS to the EPA, and OCS areas would likely be subject to the same level of control as the nearest onshore area. Note that presently any activity on the OCS which significantly affects the air quality of an adjacent state is already subject to the national ambient air quality standards under the Clean Air Act. 43 U.S.C. § 1334(a)(8).

California lawmakers are also attempting to introduce an amendment to the Clean Air Act which would allow local governments rather than the MMS to establish OCS emission limits.

- n. Section 307(f) of the CZMA. Does a state agency possess independent authority to impose either air or water quality standards on OCS operations other than those established by the EPA under Section 402 of the CWA or the DOI under the OCSLA, as amended, through the CZMA consistency process? This is an oft-debated question, but the best answer appears to be no. *See Secretary of the Interior v. California*, 104 S.Ct. 656, 662-663 (1984).

12. Use and Storage of Hazardous Materials on OCS Facilities and Oil and Hazardous Materials Transfer Operations.

- a. The U.S. Coast Guard has proposed that hazardous ships' stores regulations be made applicable to OCS facilities. 52 Fed. Reg. 25,409 (July 7, 1987).
- b. The OSHA has published an Interim Final Rule (with a Final Rule due in late 1987) on Hazardous Waste Operations and Emergency Response. 51 Fed. Reg. 45,654 (December 19, 1986). The OSHA subsequently has published its Notice of Proposed Rulemaking on the same subject. 52 Fed. Reg. 29,620 (August 10, 1987). The proposed regulations address *inter alia* site analysis, training, protective equipment, labeling, documentation

procedures, and emergency response. It is unclear whether these proposed regulations cover OCS operations since the regulations are primarily aimed at cleanup of hazardous wastes sites identified under CERCLA, which is predominantly a land-based statute, 42 U.S.C. §§ 9601-9675, and conducted under RCRA, 42 U.S.C. §§ 6901-6992. (Note: there have been 24 enforcement actions which included cleanup of waters directly adjacent to a land-based Superfund site).

P. Tank Vessel Standards for Transport or Transfer of Liquid Bulk Dangerous Cargoes: 46 U.S.C. Chapter 37

1. Summary and Small Offshore Supply Vessel Exclusion. The term "tank vessel" includes self-propelled vehicles which is either a United States vessel or operates in the navigable waters of the United States, and which also carries oil or any hazardous material (as defined in 46 U.S.C. § 2101(14)) in bulk either as cargo or as residue. 46 U.S.C. § 2101(39). The definition does exclude supply vessels under 500 gross tons in weight which transfers fuel from its tanks to either an offshore drilling vessel or an offshore oil & gas facility. 46 U.S.C. § 3702(b). All "tank vessels" must comply with the safety standards contained in 46 U.S.C. Chapter 37. Those include special steering gear control systems, alternate power supplies, means of communication, rudder angle indicators, and remote steering gear control, dual radar systems, sonic depth finders, and relative motion analyzers, *inter alia*. 46 U.S.C. §§ 3707 and 3708.

A current issue of import being debated by Congress is whether double hulls should be required for bulk tankers.

2. Pollution Rules for Ships Carrying Oil or Hazardous Liquids. 46 U.S.C. § 3701-3718 (Supp. III 1982) and 33 U.S.C. §§ 1901-1912; 46 C.F.R. Parts 30, 98, 150, 151, 153, 155, and 172; *see also*, 55 Fed. Reg. 17,275 (April 24, 1990). *See also*, Article XII.J(6)(n) *supra* for a general discussion of the rules governing transport or transfer of oil by ships.

See also, a U.S. Coast Guard Interim Final Rule clarifying and implementing Annex II of MARPOL 73/78 or the International Convention for the prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 Relating Thereto. 53 Fed. Reg. 28,970 (August 1, 1988).

See also, 54 Fed. Reg. 16,922 (April 24, 1989) regarding ships carrying hazardous bulk solids.

3. Control of Residues and Mixtures Containing Oil or Noxious Liquid Substances. 33 C.F.R. Parts 151 and 158. 52 Fed. Reg. 7765 (March 12, 1987).
4. Lightering Operations and Tank Washings. Lightering operations primarily involve transferring of cargos at sea from large deep-draft vessels to smaller shallower-draft vessels for subsequent transfer to shore-based facilities. Lightering may be required because the larger cannot enter shallow water port facilities. Any lightering operation involving crude oil or hazardous material in United States navigable waters are subject to regulation as noted below in subsection 5. 46 U.S.C. § 3715.

The revised compilation of maritime safety laws also prohibits dumping of tank washings at sea. 46 U.S.C. § 3716. If washing and dumping occurs, then the vessel is subsequently prohibited from loading any cargo at any United States port or terminal. *Id.*

5. Oil and Hazardous Material Transfer Operations and Offshore Facilities. 33 C.F.R. Parts 126, 154, and 156. These rules apply to the transfer of oil on the navigable waters or contiguous zone of the United States to, from, or within any vessel. The U.S. Coast Guard has proposed to apply these same oil pollution prevention regulations to vessels, and on- and offshore facilities transferring hazardous substances. 53 Fed. Reg. 22,118 (June 13, 1988).
6. Tank Vessel Marine Vapor Control Systems. The U.S. Coast Guard recently issued new regulations for the design, installation, and operation of marine vapor control systems. 55 Fed. Reg. 25,396 (June 21, 1990). The rulemaking itself does not require installation or use of vapor control systems. Only where states require the national ambient air quality standard set by the EPA for ozone to be met by restricting the release of VOCs from tank vessels which carry oil or chemicals in bulk, or where companies individually for occupational safety and health reasons (restrict exposure to benzene) choose to install vapor control systems would the requirements be applicable. *Id.* at 41367.

The requirements are also applicable to vessel loading or offloading activities at any offshore facility which has tankage capacity for 250 barrels or more of oil or for any other substance which is determined to be hazardous under 46 C.F.R. § 153.40. 33 C.F.R. § 154.100.

7. Hazardous Wastes. See also, Section XII.N *supra* for rules governing ocean dumping of hazardous wastes.

Q. Natural Resource Damage Assessments - Public Compensatory Damages: 43 C.F.R. Part 11

1. Summary. The DOI regulations implement Section 301(c) of the CERCLA, and Sections 311(f)(4) and (5) of the CWA.

Congress enacted the CERCLA, or "Superfund" in 1980. Pub. L. No. 96-510, 94 Stat 2767 (1980). The CERCLA empowered the executive branch to respond to threatened or actual releases of "hazardous substances, pollutants, or contaminants." Section 104(a)(1), 42 U.S.C. § 9604(a)(1). Various responses, including "removal" and "remedial actions" are available under the CERCLA. Section 101(23-25), 42 U.S.C. §§ 9601(23-25).

The CERCLA also created the Superfund as an initial financial resource of funding for response actions. Ultimately liability for the cleanup actions and perhaps undertaking the response actions themselves however rests on statutorily created classes of responsible parties.

The classes of potentially responsible parties include past and present owners of the site, as well as operators of vessels or facilities thereon; waste generators or any other person who arranged for disposal, treatment, or transport of hazardous substances; and the transporters of those same substances. *See*, sections 106(a), 107(a), and 111(a)(1) of the CERCLA. 42 U.S.C. §§ 9606(a), 9607(a), and 9611(a)(1).

The CERCLA however did not stop there. The CERCLA *also* holds responsible parties liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release." Section 107(a)(C), 42 U.S.C. § 9607(a)(C).

Liability under section 107(a)(C) is to public entities, to "the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State." Section 107(f)(1), 42 U.S.C. § 9607(f)(1).

2. **Implementing Regulations.** Section 301(c) of the CERCLA required federal promulgation of rules for assessing damages for injury to or destruction of natural resources resulting from a discharge of oil or release of a hazardous substance as defined in the CERCLA or in sections 311(f)(4) and (5) of the Clean Water Act. 33 U.S.C. §§ 1321(f)(4) and (5). The executive branch delegated that authority to the DOI.

The CERCLA required two types of natural resource damage assessment procedures. The DOI published a "Type A" procedure for simplified assessments requiring minimal field observation in March 1987. 52 Fed. Reg. 9042 (1987). The DOI previously published a "Type B" procedure for conducting assessments in individual cases in August 1986.

Section 107 of the CERCLA also authorizes a designated Federal or State natural resource trustee to recover response and cleanup costs, and damages for injury to natural resources, including damage assessment costs and prejudgment interest. The National Oceanic and Atmospheric Administration (NOAA) is usually designated trustee to recover damages to the marine environment.

Indian tribes may also commence an action as natural resource trustees under section 126(d) of the CERCLA.

3. **Regulations - General Procedure.** As noted, there are two natural resource damage assessment procedures under the rules; the standard "Type B" procedure and the simplified "Type A" procedure. Use of rule(s) by the agency is optional. Relevant Federal and State officials acting as trustees of natural resources determine compensation to public for injury to natural resources. The original regulations based damage assessments on the lesser of restoration or replacement costs or diminution of use values. *See, e.g.*, 43 C.F.R. §§ 11.35 and 11.82. Also only damage to public lands or resources were considered.

Usually, the relevant federal agency appoints a panel of scientific experts to assess nature and extent of harm. Also assessments performed by the agency under 43 C.F.R. Part 11 (Type A and B procedures) are given status of rebuttable presumption in a subsequent action to recover damages. The Exxon Valdez oil spill should provide an example of implementation of this relatively unknown statutory requirement.

See also, *U.S. v. Montrose Chemical Co.*, D.C. Cent. Calif., No. 90-3122 AAH, filed June 18, 1990, in which NOAA is seeking damages from eight companies for allegedly damaging natural resources by discharging PCBs and DDT into Los Angeles harbor.

4. *Ohio v. United States Department of the Interior*, 880 F. 2d 432 (D.C. Cir. 1989). In a case decided July 14, 1989, the United States Court of Appeals, District of Columbia, invalidated significant portions of the regulations, and remanded the proceeding to the DOI for clarification of additional issues. *Id.* at 433.

The Court of Appeals faulted the DOI on three major issues under the current regulations. First, the Court of Appeals rejected the "lesser of" damages standard noted in subsection J(3) above, holding that the CERCLA prohibited the DOI from calculating damages based on economic efficiency. The court interpreted the CERCLA to require restoration as the "presumptively correct remedy for injury to natural resources." *Id.* at 456. The court conceded that efficiency could be considered at some point in the damage calculation process. However, the court rejected the premise underlying the current DOI rule for damage calculation- that restoration is a wasteful remedy even if restoration costs exceed diminution of the value of the resource by \$1.00. *Id.* at 457.

So, the DOI must rethink its damage calculation measure. Until the regulations are revised, one must assume that the correct damage measure for damage to public resources in an oil or hazardous substance spill will be the costs of restoring the injured asset. Query: what is the restoration value of an endangered species such as a bowhead whale or a loggerhead turtle?

Second, the Court of Appeals questioned the DOI's interpretation of the definition of "natural resources." 43 C.F.R. 11.14(z). While the DOI definition simply tracks the relevant language contained in section 107(a)(C) of the CERCLA, the DOI limited damage assessments to resources specifically owned by an Indian Tribe or any government entity. The court held that where a governmental agency exercises a substantial degree of control or management over private resources, then the damage assessments must also include any injury to that private property. The court also remanded this issue to the DOI to determine where that degree of control or involvement occurs. *Id.* at 460, 461.

Third, the court invalidated the DOI's market value method of valuation of damaged resources. The invalidated standard limited recovery to the price commanded by the resource on the open market, unless the trustee finds that "the market for the resource is not reasonably competitive." 43 C.F.R. § 11.83(c)(1). Then the trustee appraises the market value based upon the "Uniform Appraisal Standards for Federal Land Acquisition." 43 C.F.R. § 11.83(c)(2).

The court rejected the DOI's interpretation of section 301(c) of the CERCLA which based valuations on use value alone, and remanded the regulations to the DOI to consider incorporation of option and existence values into the evaluation process. *Id.* at 464.

The *Ohio* decision reopened many issues as to the extent and method of damage calculations under the natural resource damage assessment regulations. However, the court did approve of the general procedure contained in the current regulations. For that reason the Type A procedure for use in coastal and marine environments is shown hereafter.

5. Type A procedure. The procedure requires minimal field observation and is for use in coastal and marine environments: 54 Fed. Reg. 5094 (February 1, 1989).
 - a. Preassessment Phase. The purpose of this phase is to establish that whether a CERCLA or CWA covered incident has occurred and whether resources of the specific trustee may have been affected.

- b. **Assessment Plan Phase.** The trustee must first develop an Assessment Plan before undertaking assessment of the incident. Procedurally, the trustee should coordinate with other affected trustees, attempt to identify any PRPs, and allow public review and comment on the proposed Plan. Technically, the Plan must document the parameters to be used as data inputs in the application of the NRDAM/CME as required by 43 C.F.R. §§ 11.31(d) and 11.41(e), including boundaries of and ecological characteristics of the study area.
- c. **The NRDAM/CME or Assessment Phase.** Subsequent to development of an Assessment Plan, the trustee then utilizes a computer model called NRDAM/CME. The NRDAM/CME which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 (PB 87-142485), consists of physical fate (the direction that the oil travels), biological effects or losses or injuries to biological populations within the ecosystem, and economic damages based market and non-market prices for services provided by the natural resource. A printed output is produced and provided.
- d. **Post-Assessment Actions.** Several events occur. First, the trustee compiles a Report of Assessment which includes all documentation, data collected, and test results. The Report becomes the administrative record for the natural resource damage assessment. The trustee then presents a demand for damages to the PRP. The PRP may respond to the demand. What is unclear however, is whether this is the first time in the process that the PRP may respond. For obvious reasons, it is imperative that the PRP have input on parameters that are used in the assessment itself. The process however does not provide formally for such input. Also, how about simple coding errors in inputting data under the NRDAM/CME? How can the PRP verify whether any such errors were made?
- e. **Restoration Plan.** The trustee develops a plan to restore or replace the "injured resource" based on the amount of the damage award.

6. Supplemental Liability. These "public compensatory damages" are in addition to response or remedial actions (cleanup) addressed by the larger statutory scheme of CERCLA and the FWPCA: 51 Fed. Reg. 27,674 (August 1, 1986).
7. Further Reading. For additional reading on the topic of natural resource damage assessments, see L. Schenke, *Liability for Damages Arising from an Oil Spill*; 4 Natural Resources and Environment 14 (1990).

R. Documentary, Registry and Manning Requirements: 43 U.S.C. § 1356

1. The OCSLA, as amended, requires that any vessel, rig, platform, vehicle or structure built or rebuilt after September 18, 1978 and used on the OCS must be: (a) Documented under the United States' laws; (b) meet certain U.S. Coast Guard design requirements; and (c) be in most cases manned or crewed by U.S. citizens or resident aliens. 43 U.S.C. § 1356; 33 C.F.R. Part 141.
2. The crew requirements have traditionally been loosely enforced. However, the presence of foreign OCS vessels offshore California in Fall 1981 led to an exchange of gunfire with local union members.
3. Nondiscrimination in Employment on the OCS. 30 C.F.R. Part 271. The MMS has issued proposed rules to implement Section 604 of the OCSLA Amendments of 1978. 52 Fed. Reg. 17,770 (May 12, 1987). The proposed regulations are beyond the original deadline to be finalized. 53 Fed. Reg. 13,940 (April 25, 1988). The proposed regulations prohibit unlawful discrimination in employment on the OCS and propose an informal process for the MMS review of any complaints.
4. Nondiscrimination in Contracting. See, 30 C.F.R. Part 270.

S. **Alcohol, Tobacco, and Controlled Substances; Chemical, Drug, and Alcohol Testing of Commercial Vessel Personnel: 46 C.F.R. Parts 4, 5, and 16**

1. **Summary and Applicability.** The U.S. Coast Guard recently published regulations which aim to ensure a drug-free working environment in the maritime industry. The U.S. Coast Guard based its authority for publication of the regulations on its general authority to deny or revoke the license, certificate of registry, or merchant mariner's document of any individual who has been convicted of violating a dangerous drug law of a state or the United States, or who is or has been a user of dangerous drugs. 46 U.S.C. § 7503; 46 U.S.C. §§ 7704(b) and (c). The regulations require employers to attempt to identify users of dangerous drugs (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802) prior to maritime accidents. However, mandatory testing following serious maritime accidents is also required by the regulations. 53 Fed. Reg. 47,064 (November 21, 1988). The time frames and situations in which testing may occur are enumerated below.

The regulations make it the obligation of the marine employer to carry out the regulatory provisions. 46 C.F.R. §§ 4.06-1 and 16.201. Various challenges to the regulations will likely occur. Note, however, that the Supreme Court has already held that post accident drug and alcohol testing is a reasonable way to protect the public and workers from operation of equipment by drug-impaired employees. *Skinner v. Railway Labor Executives' Association*, 109 S.Ct. 1402 (1989). On December 18, 1989, the United States District Court for the District of Columbia enjoined that portion of the U.S. Coast Guard rule which required marine employers who employed more than 50 employees to commence random drug testing on December 21, 1989. *Transportation Institute v. United States Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989), and in District 2, *MEBA MNU v. Burnley*, 700 F. Supp. 1043 (N.D. Ca. 1988).

In the opinion, the District Court approved the concept of random drug testing, but found the current 46 C.F.R. § 16.205 too broadly drawn in order to satisfy Fourth Amendment requirements. The District Court remanded the proceedings to the U.S. Coast Guard with an order to draft narrower random testing regulations.

Under most circumstances, random drug testing will be found to be impermissible based on a variety of rationales. However some courts have permitted random drug testing based on the nature of the employment or industry, or the timing of the test. For example, some courts permit random drug testing of applicants for employment. In *NTEU v. Von Rabb*, 109 S.Ct. 1072 (1989), the Supreme Court upheld random testing of applicants for transfer to sensitive jobs because the applicant voluntarily chose to apply and therefore be tested "only as a result of a process they chose to set in motion."

In *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987), a federal appeals court held that an applicant's consent to submit to a drug test as a condition of employment may diminish an employee's expectation of privacy in determining whether the search is reasonable.

In *Jones v. McKensie*, 833 F.2d 335 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia Circuit held that random drug testing of school bus drivers as part of a routine, employment-related physical examination is permissible if test methods can reveal on-duty use or impairment. See, *Wrightsell v. City of Chicago*, 678 F. Supp. 727 (N.D. Ill. 1988), for a similar holding related to routine employment-related physicals of police officers.

In any case, the area is a hotbed of dispute and litigation and the revised U.S. Coast Guard regulations will likely be challenged again in some fashion or forum.

Two of the biggest issues to the maritime industry including offshore operators will likely be the lack of on-site testing facilities and the use of only specific government approved laboratories for obtaining test results. The U.S. Coast Guard has taken the position that in offshore incidents involving OCS Lessees that they will look post accident for both alcohol and drugs. Moreover, the U.S. Coast Guard will expect the OCS Lessees to do the testing and will require that the tests comply with U.S. Coast Guard rules. (Note that under the August 29, 1989 Memorandum of Understanding between the MMS and the U.S. Coast Guard, that the U.S. Coast Guard was designated the lead investigatory agency for a number of types of offshore incidents. 54 Fed. Reg. 39,820, 39,823 (September 28, 1989). Thus, an OCS Lessee may be faced with the possibility of conducting two tests: one test to satisfy the U.S.

Coast Guard regulations, and another test to satisfy its own company guidelines.

Finally, on December 27, 1989, the U.S. Coast Guard revised its regulations to exclude from the testing requirements any person for whom a foreign government contends application of the rules would contravene that country's domestic laws or policies. 54 Fed. Reg. 53,286 (December 27, 1989). Note that this exclusion does *not* apply to U.S. based employees of American subsidiaries of foreign companies. See Wright, *Drug and Alcohol Testing of Maritime Personnel*, 20 J. Mar. L. & Com. 541 (October 1989), for further discussion of the U.S. Coast Guard Regulations and the countervailing interests of the government in maintaining safety in the maritime industry and of the employees in maintaining their privacy.

Meanwhile no federal standard exists as to smoking in the workplace. However relevant common law rules and state law should be considered since federal regulation does not preempt state regulation of smoking tobacco.

2. Regulated Substances. "Dangerous Drug" means " a narcotic drug, controlled substance, and marijuana as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970." 21 U.S.C. § 802.
3. Periodic Testing in Conjunction with License Application or Renewal. 46 C.F.R. § 16.220. The new regulations mandate periodic testing in conjunction with any license application which requires a physical examination. Alternatively, the applicant may provide evidence of a similar recent drug test. The test results must be forwarded to the U.S. Coast Guard Regional Examination Center.
4. Pre-employment Testing. 46 C.F.R. § 16.210. Each marine employer must test any person proposed to be hired as a crewmember on a commercial vessel. Alternatively, the individual may produce evidence of a recent and similar pre-employment or random drug test.
5. Random Testing. 46 C.F.R. §§ 16.205 and 230. The U.S. Coast Guard regulation which required each employer to test at least 50% of its crewmembers randomly on an annual basis for drug usage was invalidated in the *Transportation Institute* case as noted previously. The U.S. Coast Guard is currently

drafting a narrower random testing requirement which will be published for comment in the spring 1990.

6. Post-Casualty Testing. 46 C.F.R. § 4.06. These regulations are of direct interest to offshore operators. Whenever there is a "serious marine accident" [46 C.F.R. § 4.03-2(a)] or a discharge of 10,000 gallons or more of oil or of a reportable quantity of a hazardous substance into the navigable waters of the United States, *whether or not* the discharge results from a marine casualty [46 C.F.R. § 4.03(c)], the employer must collect both a urine specimen and a blood or breath specimen of any individual directly involved in the accident. 46 C.F.R. §§ 4.06-5 and 10.

The requirements are unique in that the employer itself and not the U.S. Coast Guard or a law enforcement representative (if none are available) must administer the test. 53 Fed. Reg. 47,068 (November 21, 1989). In addition the test must comply with U.S. Coast Guard post-casualty testing requirements regardless of any company's own testing policies.

7. Alternate Testing Technologies. 40 C.F.R. §§ 16.301-380. Alternate test methodologies, except the testing of hair samples, are authorized.
8. The Anti Drug Abuse Acts of 1986 and 1988. Note that vessel owners are subject to substantial penalties and seizure and forfeiture of their vessels if unmanifested drugs are transported on them in violation of customs laws. 19 U.S.C. §§ 1584, 1594. Note, that non-common carrier vessels have an "innocent owner" defense. 19 U.S.C. § 1594(b)(2) ("without the knowledge, consent, or willful blindness of the owner.").

Query: Would a floating platform be considered a "vessel" for purposes of customs law enforcement?

9. Ancillary Health Hazards - Smoking in the Workplace. The OSHA has not enacted any federal standard relating to tobacco smoke, nor has the OSHA granted non-smokers a right of action under any general standard. Note, however, that the OSHA does not preempt state regulation of smoking in the workplace.

In fact, 43 states have enacted laws that regulate smoking in the workplace in some fashion. Query: May states restrict

tobacco smoking practices on OCS facilities under Section 203 of the OCSLA, as amended? 43 U.S.C. § 1333. *See also* the EPA's draft document "Environmental Tobacco Smoke: A Guide to Workplace Smoking Policies," EPA/400/6-90/004. 55 Fed. Reg. 25,874 (June 25, 1990).

10. Regulation of Tobacco Smoking - Relevant Case Law. At least one state court has found that employees enjoy a common law right to a safe work environment and would require an employer to restrict smoking if an employee is adversely affected by smoke. *Shrimp v. New Jersey Bell*, 368 A.2d 408 (N.J. Sup. Ct. 1976).

Note also, that where a sensitive non-smoker quits, is fired, or becomes disabled because of smoke, he/she may be entitled to disability, workers' compensation, or unemployment benefits. The person may also be able to state a claim under the Rehabilitation Act of 1973. *See, Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982).

Finally an employer may regulate smoking in the workplace free of any constitutional challenge. *Grusendorf v. Oklahoma City*, 816 F.2d 539 (10th Cir. 1987).

T. Offshore Supply Vessels (OSVs) Including Liftboats

1. Summary. On May 9, 1989, the U.S. Coast Guard published proposed regulations which consolidate all OSV standards into Subchapter L of Title 46 of the C.F.R. The proposed regulations make specific revisions to accommodate the unique characteristics of OSVs, including supply boats, crew boats, and lifeboats, their methods of operation, and the types of service in which they are engaged. 54 Fed. Reg. 20,006 (May 9, 1989). 46 C.F.R. Parts 125-136, 170, and 174.

The proposed regulations combine and revise the various authorities applicable to OSVs. Specifically they combine the requirements currently contained *inter alia* in 46 Parts 91,92,173,183-85; various Navigation and Vessel Inspection Circulars; the Marine Safety Manual; and certain International Maritime Organization Resolutions. See the Reference Table at 54 Fed. Reg. 20,009 of the preamble for a complete compilation of sources.

The U.S. Coast Guard states in the preamble to the regulations that many of the proposed requirements are similar to those contained in 46 C.F.R. Subchapters I and T. Those subchapters regulate pre-1979 constructed OSVs. Subchapter I governs cargo and miscellaneous vessels of greater than 15 tons and less than 100 tons. Subchapter T governs small passenger vessels if less than 100 tons and carrying more than six passengers for hire.

The boats operate primarily in the Gulf of Mexico, although some boats operate on a worldwide basis.

2. **Applicability.** The proposed revised regulations would only apply to new OSVs, i.e., any OSV which is contracted for after the final version of the proposed regulations are published and take effect. *Id.* at 20008. Existing OSVs would have the option of being certificated under these proposed regulations. Otherwise, existing OSVs are regulated under Navigation and Vessel Inspection Circular 8-81, "Initial and Subsequent Inspection of Uncertified Offshore Supply Vessels Under Pub. L. No. 96-378, as amended." Note too, that the proposed regulations would apply equally to liftboats, as well as other types of OSVs. That is significant in that most liftboats currently possess certificates which restrict their utilization. Thus under the new certification procedure, liftboats would enjoy a wider and less restrictive scope of operation than before.
3. **Consolidation of Previously Published Advanced Notices of Proposed Rulemaking (ANPRM).** Liftboats are frequently used offshore in dive support, painting, sandblasting, and well servicing activities. Given their high casualty rate, the U.S. Coast Guard initially chose to regulate them separately from other OSVs. 46 C.F.R. Chapter 1; § 52 Fed. Reg. 12,439 (April 16, 1987). However, these proposed regulations consolidated the above 1987 ANPRM with the 1983 ANPRM which would have applied only to OSVs other than liftboats.
4. **Hazardous Materials in Bulk.** 46 C.F.R. § 125.110. Generally, the proposed regulations limit carriage of various types of hazardous bulk materials or liquids to 20% of the vessel's deadweight, with two exceptions. *Id.* That is, fuel oil and drilling fluids may be carried without limit. 46 C.F.R. § 125.110(b)(1)(ii).

International Maritime Organization (IMO) proposal. The IMO Subcommittee on bulk chemicals recently finalized "Guidelines for the Transport and Handling of Limited Amounts of Hazardous and Noxious Liquid Substances in Bulk on Offshore Support Vessels." The basic provisions would limit carriage of hazardous and/or noxious liquids in bulk to not more than 40% of an OSVs deadweight, using a specific gravity of 1.0, but not more than a volume of 800 cubic meters. The U.S. Coast Guard has stated that they will implement the guidelines once the guidelines become applicable internationally. 54 Fed. Reg. at 20,010. The effect of the potential limitations on offshore drilling activities, especially on deep or multiple well programs which require greater amounts of drilling mud is unclear.

5. Carriage of Offshore Workers. 46 C.F.R. § 126.180. The proposed regulations authorize OSVs to carry up to 36 offshore workers as authorized in the vessel's Certificate of Inspection in domestic waters so that the vessels may also shuttle workers from shorebases to offshore facilities when air transportation is not available. 46 C.F.R. § 125.100(a)(2).
6. In the meantime, certain elements of OSV activity are regulated under U.S. Coast Guard's general maritime regulations.
 - a. Merchant Marine Officers and Seamen Licensing. 46 C.F.R. Parts 10 and 12.
 - b. General Provisions - Cargo and Miscellaneous Vessels. 46 C.F.R. §§ 90.05-20; Vessel Manning Requirements. 46 C.F.R. §§ 157.10-87.
 - c. Small Passenger Vessels Rules (Under 100 Gross Tons). 46 C.F.R. §§ 175.10-40.
 - d. Oil and Hazardous Material Transfer Operations. 33 C.F.R. Parts 126, 154, and 156. See Subsection J *supra* for special requirements for lightering oil and hazardous material cargos from vessel to vessel.
 - e. Lifesaving Equipment. Lifesaving equipment requirements for all self-propelled vessels, including offshore supply vessels and mobile offshore drilling units, have been proposed for consolidation by the U.S.

Coast Guard into one regulatory section in order to implement Chapter III of the Safety of Life at Sea Convention 1974, as amended in 1983 (SOLAS 74/83). 46 C.F.R. Part 199; 54 Fed. Reg. 16,198 (April 21, 1989).

The new regulations not only consolidate but also upgrade, modify, and extend the scope of the current safety equipment requirements. In addition operational and personnel training requirements have been included in the regulations as well. See Subsection P *infra* for further details.

- f. Lifejackets and Personal Flotation Devices. The U.S. Coast Guard has published proposed standards which establish content and construction requirements for U.S. Coast Guard approved flotation devices. 54 Fed. Reg. 47,234 (November 13, 1989).

The U.S. Coast Guard also published an interim final rule governing construction and performance standards for inflatable lifejackets. 46 C.F.R. Part 160; 54 Fed. Reg. 50,316 (December 5, 1989). The regulations proposed April 21, 1989 by the U.S. Coast Guard to implement SOLAS 74/83 require such devices as part of standard lifesaving equipment on vessels.

- g. Marine Asbestos Hazard. The U.S. Coast Guard announced that it is considering publishing regulations which would hopefully limit the asbestos hazard to marine personnel on marine vessels including OSVs and MODUs, as well as personnel on OCS facilities. 54 Fed. Reg. 44,915 (October 30, 1989); 46 U.S.C. § 3306(a); 43 U.S.C. § 1333.

U. Mobile Offshore Drilling Units: 46 C.F.R. Parts 107-109

- 1. Summary. In 1985, the U.S. Coast Guard published an Advance Notice of Proposed Rulemaking aimed at regulating MODUs. 50 Fed. Reg. 11,741 (March 25, 1985). The U.S. Coast Guard is progressing slowly with the proposed regulations as it is working with the IMO in order to coordinate the U.S. Coast Guard's requirements with IMO's international regulations. The U.S. Coast Guard expects publication of proposed regulations sometime after March

1990. 54 Fed. Reg. 44,920 (October 30, 1989). The proposed revisions will update the current requirements, delete some unnecessary requirements, and also address major casualty-related issues.

2. Current Regulations. "The design, construction, equipment, inspection, and operation of MODUs currently operating under the U.S. flag" are governed by extensive regulations appearing at 46 C.F.R. Parts 107-109. 46 C.F.R. § 107.1.

Domestic and Foreign MODUs. The applicable U.S. Coast Guard design and equipment standards vary depending on whether the MODU is of U.S. or foreign registry. 33 C.F.R. § 143.200.

3. Licensing of Officers and Operators of MODUs. 46 C.F.R. §§ 10 and 15. The U.S. Coast Guard recently published interim final regulations for comment. 55 Fed. Reg. 14,792 (April 18, 1990). The regulations establish both licensing and training requirements for officers on MODUs and also establish manning and crew training standards for personnel thereon. 46 U.S.C. §§ 2103, 3703, and 8105. The categories and training requirements vary primarily based upon the type of MODU involved, and whether the MODU is underway or on location.

The interim final rulemaking established two classes of licenses and requires all applications to convert existing MODU licenses or obtain new licenses to be submitted to the U.S. Coast Guard Regional Examination Center in New Orleans.

Deck officers' licenses are required for all Masters of MODUs. 46 C.F.R. §§ 10.103 and 10.468. The licenses are either issued or endorsed to authorize the Master "Offshore Installation Manager" to pilot various types of MODUs, either underway or on location. 46 C.F.R. § 10.470.

Additional separate licenses or endorsements are required to be master on barges or to oversee ballasting operations. 46 C.F.R. §§ 10.472 and 474.

In addition, Chief Engineers or Assistant Engineers who oversee propulsion systems on MODUs must be licensed. See Table 10.920-2 for the specific training requirements which must be satisfied in order to obtain any of the above licenses, or endorsements on current licenses. 46 C.F.R. § 10.920.

V. Lifesaving Equipment for Self-Propelled Vessels Including OSVs and MODUs: 46 C.F.R. Part 199

As noted under the OSV section above, the U.S. Coast Guard has proposed to consolidate and revise lifesaving equipment requirements for all self-propelled vessels in order to conform with SOLAS 74/83 international treaty requirements which became effective in the U.S. in July 1986. 46 U.S.C. § 3306.

The proposed regulations establish requirements generally applicable to ocean service vessels, and then also establish specific requirements for particular classes of vessels such as tankers, passenger carriers, cargo ships, OSVs, and MODUs.

1. General Requirements. 46 C.F.R. §§ 199.62-199.175. Each vessel must carry or maintain a host of lifesaving related materials and appliances. Those include two-way radio equipment, emergency position radio beacons, distress flares, ring life buoys, lifejackets, immersion suits, whistles, station bill, survival craft and operating instructions, with stowage above the waterline with a 20 degree list, and life throwing appliances.
2. MODUs. MODUs come in various shapes and sizes. Unlike ships, MODUs have three, four, or even five sides, and the decks are usually far above the waterline. The U.S. Coast Guard tried to accommodate those differences by following the guidelines of the draft IMO Code for Construction and Operation of MODUs in its proposed regulations. 54 Fed. Reg. at 16,215. See, 46 C.F.R. Part 600 for the specific lifesaving device requirements for MODUs.
3. OSV's. The primary difference for lifesaving purposes between a regular ocean service vessel and an OSV is that the OSV will frequently carry persons in addition to the regular crew. 54 Fed. Reg. at 16,214. For that reason variable capacity lifesaving equipment is necessary on an OSV. See, 46 C.F.R. Part 400.

W. Certificates of Financial Responsibility for Offshore Vessels and Structures

1. Summary. The 1978 OCSLA Amendments created the Offshore Oil Pollution Compensation Fund which requires both offshore facilities and vessels of greater than 300 gross

tons to maintain evidence of financial responsibility to pay for offshore oil spills or pollution. 43 U.S.C. § 1815; 33 C.F.R. Parts 130-135.

2. Offshore Vessels

- a. Each vessel over 300 gross tons using any port in or sailing in the navigable waters of the United States and which is transporting OCS produced oil must carry a U.S. Coast Guard Certificate of Financial Responsibility. 33 C.F.R. § 130.9; 33 C.F.R. § 132.2(v).
- b. A vessel owner's liability is limited to \$300/gross ton of the vessel or \$250,000, whichever is greater, unless that owner fails to cooperate with federal officials in cleanup operations. 43 U.S.C. § 1814(b)(1); 33 C.F.R. § 132.3(a), plus the costs noted in subsection (4) *infra*.

3. Offshore Facilities Including Drilling Units

- a. Owner must apply for a certificate at least 45 days before placing the offshore facility into operation or coverage becomes effective. 33 C.F.R. § 135.215(a).
- b. An offshore facility's liability for removal, cleanup costs and all other damages is \$35,000,000. 43 U.S.C. § 1814(b)(2).
- c. The term "offshore facility" includes mobile drilling units. 43 U.S.C. § 1811(8).
 - i. A mobile offshore drilling unit must report various information to the U.S. Coast Guard about its proposed OCS operations 14 days before arrival or relocation of the unit on the OCS, or as soon thereafter as is practicable. 33 C.F.R. § 146.202.
 - ii. The Lessee may act as an indemnitor for the mobile drilling unit, if the unit owners are unable or unwilling to establish and maintain evidence of financial responsibility. 33 C.F.R. § 135.210.

4. Miscellaneous.

- a. Notwithstanding, the damage limits contained in 43 U.S.C. §§ 1814(b)(1) or (2), all costs incurred by any government agency or official in connection with a discharge of oil from any offshore facility or vessel shall be borne by the owner or operator thereof. 43 U.S.C. § 1814(d).
- b. Note also that no liability attaches "if the incident is caused solely by the negligent or intentional act of the damages party or any third party (including any government entity)." 43 U.S.C. § 1814(c)(2).

X. Sales of Vessels to Non-United States Citizens

1. Summary. Offshore oil and gas operations entail utilization of many types of offshore vessels. Well drilling operations require drilling vessels such as jackup drilling rigs or barges, or submersible or semi-submersible drilling units.

Supply boats move both personnel and materials to offshore structures as well as to drilling rigs. Finally tug boats and barges occasionally move crude oil production from offshore facilities to shore.

Many foreign governments provide tax credits for acquisition and ownership of both barges and self-propelled vessels which are utilized in offshore oil and gas operations. For that reason, many foreign corporations seek to acquire United States flag vessels from U.S. offshore service contractors.

2. Vessel Sale Process. There are two separate elements involved in the sale of a United States flag vessel to a foreign corporation, and reregistry of the vessel under a foreign flag.

First, the private parties must conclude an agreement and document that agreement. Frequently the parties structure the transaction similar to English maritime contracts and put the general terms of the agreement into a Letter Agreement, and follow the Letter Agreement with a full-fledged contract sometimes called a MOA.

The Letter Agreement touches generally on all aspects of the agreement, the vessel(s) to be sold, the associated equipment,

the price, the financing arrangement, the conditions precedent to be satisfied before the buyer's purchase obligation is firm, and the corporate entities to be involved.

The MOA focuses on the vessels and equipment, and the method of physical transfer thereof, as well as title thereto.

Usually the Letter Agreement requires the purchaser of the vessels to place an earnest money deposit at some mutually agreeable bank. Generally the earnest money deposit, as well as any other deposits specified by the Letter Agreement or MOA such as vessel repair deposits, are governed by an escrow agreement.

Finally, as is common in international sales, the payment of the remaining monies due under the agreement are governed by some form of a letter of credit.

Second, the parties must obtain United States Government approval both the sale of a United States flag vessel to a non-United States citizen and reflagging of the vessel under a foreign flag.

3. Government Approval Process. After concluding an agreement for the sale of a United States flag vessel, the seller must seek United States government approval for the transaction.

Basically there are two elements to the process. There is the actual approval process involving the DOT, Maritime Administration (MARAD). Then there is the title changeover process involving the U.S. Coast Guard.

4. MARAD Approval. Section 9 of the Shipping Act of 1916 states in relevant portion as follows:

"[A] person may not, without the approval of the Secretary of Transportation - (1) sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to a person not a citizen of the United States, any interest in or control of a documented vessel . . . owned by a citizen of the United States or the last documentation of which was under the laws of the United States; or (2) place a documented

vessel, or a vessel the last documentation of which was under the laws of the United States, under a foreign registry or operate that vessel under the authority of a foreign country." 46 App U.S.C. § 808(c).

An owner of a United States flag vessel must petition the MARAD pursuant to the regulations contained at 46 C.F.R. Parts 67 and 221 for approval of any such transfer.

Currently, there is no formal definition of a Non-Citizen of the United States for foreign sales purposes (although pending revisions to 46 C.F.R. §§ 221.3 and 221.13 will resolve the problem. 55 Fed. Reg. 14,040 (April 13, 1990)). However, MARAD informally refers to U.S. flag vessel the citizenship requirements for persons and corporations which appear in Section 2 of the Act. 46 U.S.C. § 802.

Under Section 41 of the Act, MARAD may condition approval of any such transfer in its discretion. 46 App U.S.C. § 839. While the Shipping Act does not enumerate any limitations on the exercise of that discretion, MARAD has promulgated by regulation a list of standard conditions which it will likely impose upon the purchaser of the vessel. 45 C.F.R. Part 221, Appendix; currently proposed to be revised and recodified at 46 C.F.R. § 221.19; 55 Fed. Reg. 14,054 (April 13, 1990).

Those conditions relate primarily to sales of vessels of 3,000 gross tons or more. The conditions relate to future change in ownership or registry of the vessel; use of the vessel to trade with certain prohibited countries; restrictions on scrapping the vessel; posting of a bond; and appointment of a resident agent in the United States for service of process purposes.

For oil and gas industry purposes, the most significant restriction is the standard MARAD restriction on subsequent transfer of ownership in the foreign corporation. To wit: "without prior approval of the Maritime Administrator, there shall be no transfer of stock interest in the foreign corporate contractor to persons not citizens of the United States (within the meaning of Section 2 of the Shipping Act, 1916)." 46 C.F.R. Part 22, App. § A(1)(b).

On its face, the condition is impossible to satisfy for any foreign corporation whose stock trades on a public stock

exchange. Informally MARAD will issue a Transfer Order upon the purchaser's request which waives this requirement up to the extent which "controlling interest" is defined in Section 2 of the Shipping Act. That is up to 49.99% of the corporation's stock may be transferred without violating the above restriction, subject to the provision that MARAD may also find a lesser percentage concentrated in one person's hands or through voting trusts to constitute a "controlling interest" of a large public corporation. (*See also*, proposed 46 C.F.R. § 221.19(c)(2) which will codify this currently informal practice; 55 Fed. Reg. at 14,054).

However, many publicly traded foreign corporations still find even this MARAD compromise unacceptable, often because the foreign stock exchange upon which the corporation's stock trades prohibits any restrictions upon the alienation of the foreign corporation's stock.

The solution to date has been to create a 100% wholly-owned subsidiary of the foreign corporation and to place the vessel in the subsidiary in order to avoid the stock transfer limitations imposed by the Shipping Act of 1916. Hopefully, new oil spill liability legislation which is pending before Congress will not abrogate this practice other than for vessels which traffic in bulk crude oil cargoes.

5. U.S. Coast Guard Title Deletion Process. After MARAD has approved sale of the vessel to non-citizens of the United States and reflagging of the vessel under the desired foreign country's flag, the seller needs to change record ownership of the vessel.

The U.S. Coast Guard maintains record title to United States flag vessels at the designated home port for that vessel. Particular filing requirements for transactions involving vessels appear at 46 C.F.R. Part 67, Appendices. Appendix C lists the requirements to be met in order to delete a U.S. flag vessel from United States registry.

Specifically, three documents are required. 46 C.F.R. § 67.25-13; first, the vessel owner must file the original Certificate of Documentation (i.e. vessel title document). Second, the owner must show evidence of MARAD consent to the transfer or sale. Best evidence of that consent is a copy of the Transfer Order which MARAD issues when it has approved the Form MA-29 which the Seller previously submitted to MARAD.

Occasionally, MARAD sends a copy of the Transfer Order directly to the U.S. Coast Guard Vessel Documentation Office in the home port of the vessel. However, the seller should also deliver a copy of the MARAD Transfer Order to the U.S. Coast Guard just in case MARAD omits to send the document.

Finally, the owner is required to submit "evidence of the sale or transfer." *Id.* The relevant U.S. Coast Guard regulation does not indicate what that evidence should be, but I note that the U.S. Coast Guard has a form for a Bill of Sale. 46 C.F.R. § 67.23-13(a); Form CG-1340.

Once proper documentation has been submitted, the U.S. Coast Guard will usually issue a Certification of Deletion within 24 hours thereof.

Y. Fishermen's Contingency Fund: 43 U.S.C. § 1842

1. Summary. The 1978 OCSLA Amendments created the Fishermen's Contingency Fund. 43 U.S.C. §§ 1841-1847 (1982). The fund provides a mechanism for compensating commercial fishermen for damage to fishing gear caused by obstructions related to OCS oil and gas activities. *Id.*; 50 C.F.R. § 296.1.
2. Each holder of any OCS permit, lease, right-of-way, or pipeline easement, excepting only geological and geophysical permits, must pay an annual assessment calculated by the Secretary of Commerce but collected by the MMS into the fund. The annual amount shall not exceed \$5,000 per lease, permit, easement, or right-of-way. 50 C.F.R. §§ 296.3(b) and (b)(3); 30 C.F.R. § 218.152.
3. No claim against the fund will lie if claim is not filed within 90 days of date that claimant became aware of loss; to the extent claimant has insurance for loss or claimant's negligence caused loss; and to the extent damage or loss exceeds replacement value of fishing gear involved. 50 C.F.R. § 296.4.
4. Claim submitted to National Marine Fisheries Service (NMFS). The NMFS then sends abstract of claim to Department of Interior. The DOI then immediately sends casualty coordinates to all persons engaged in OCS energy activity in area of claim. 50 C.F.R. § 296.6(c).

5. Each person notified by the DOI must respond to claim within 30 days of receipt. If one person fails to respond, the DOI will assume that such lack of response constitutes a denial of liability. 50 C.F.R. § 296.6(c).
6. If any person admits liability, the NMFS will seek to recover the damages from that person. 50 C.F.R. § 296.6(c)(3). Otherwise the fund will pay claim and claimant then assigns any potential rights of subrogation to the NMFS. 50 C.F.R. §§ 296.8 and 296.14(a).

Z. Department of Defense Offshore Military Activities Program: 32 C.F.R. Part 252

The armed forces utilize various areas offshore for bombing, missile, and gunnery practice, as well as anti-submarine practice drills. (Offshore Military Practices Program; 32 C.F.R. § 252.3.) The Department of Defense is committed to sharing the OCS with non-military interests whenever possible. 32 C.F.R. § 252.4(a). Realistically any conflicts between military activities and oil and gas leasing are accommodated by inclusion of restrictions within OCS Lease Sale notices and by stipulation within affected OCS leases themselves.

AA. Miscellaneous - Identification of and Access to Structures

1. Identification. Lessee must mark each platform, structure, and wellhead. 30 C.F.R. § 250.15.
2. Access to facilities. Lessee must maintain access for MMS personnel to platforms, artificial islands, and other structures. Also, if requested, the Lessee must provide food, quarters, and transportation to MMS personnel. However, the Lessee may request reimbursement. 30 C.F.R. § 250.21.

XIII. Production-Related Reporting Requirements

A. Summary

The 1988 MMS revisions to their OCS operating regulations expanded already extensive production-related reporting requirements offshore. Reports are required whenever various problems arise such as fatalities, fires, injuries, blowouts, spills, and well kicks. But there are many other less prominent and quite esoteric reporting requirements that need to be satisfied too, as will be noted below.

In reporting, the MMS authorizes parties either to report on standard MMS forms or on similar forms which are computer generated by the parties themselves. 30 C.F.R. § 250.17(b).

Since this manual chiefly details OCS operational requirements, questions relating to OCS royalty payments are only briefly addressed, if at all. One should be aware however of the OCS royalty reporting requirements contained in 30 C.F.R. Part 210 generally.

B. Commencement or Cessation of Production

First, always notify the MMS within five business days of when a well commences production, or when a well resumes production after a cessation of more than 90 days. 30 U.S.C. § 1712(b)(3).

A special rule applies to an OCS lease in its secondary term. If the lease is not in suspended status, then the Lessee must submit a report to the MMS District Supervisor within 15 days after the end of the month when the last well on the lease ceases to produce. 30 C.F.R. § 250.23.

C. Oil and Hazardous Substance Spill Reporting Requirements.

Obviously, an oil or other liquid spill on the OCS may drift into state waters. The following chart reflects both federal and at least western Gulf of Mexico state agencies that should be contacted in the event of a spill.

Oil Spill Reporting Requirements

| Location | Size | Agency | Phone | Notification Requirement |
|-----------------------------|--------|---|--------------------|--|
| State & All Fed'l Waters | | U.S.C.G. Nat'l Response Cntr. | 1-800- 424-8802 | Verbal - Immediately |
| | | 3 U.S.C. 1906(a) 40 C.F.R. 110.10 33 C.F.R. 153.203 | | Written - Post Cleanup |
| Federal | <1 BBL | MMS District | | Verbal - 12 Hours |
| Federal | >1 BBL | MMS District | | Verbal - Immediately Written - Post Cleanup |

| Location | Size | Agency | Phone | Notification Requirement |
|---|--------------|--|--|--|
| Louisiana (w/in 3 mi. of shore) | >1 BBL | Dep't Env. Quality State Police | (504) 342-1234 (504) 925-6595 | Verbal - Immediately Written - Post Cleanup |
| Texas (w/in 3 leagues or 10.35 miles of shoreline) | >5 BBL | Railroad Comm. District | | Verbal - Immediately Written - Post Cleanup |
| Pipeline All | MMS Pipeline | Pipeline Section Afttr Hrs. | (504) 736-2554 (504) 347-6095 | Verbal - Immediately Written - Post Cleanup |
| Oil Pipeline (In addition to above req'ts) | All | DOT | (202) 426-0700 | Verbal - Immediately Written - After Repair |
| Vessel (At company facility) | All | Procedure Same as Geographically Applicable Above | | |
| Vessel (In route or fault of crew) | All | Reported by Captain or Charter Co. 46 U.S.C. 6101 | | |

Hazardous Substance Reporting Requirements

| Spill Location | Agency | Telephone | Notification Requirement |
|-----------------|-------------------------------|--|--|
| State & Federal | National Response Center | 1-800- 424-8802 | Verbal - Immediately Written - Post Cleanup |
| Federal | EPA Region After Hours | (214) 767-2720 (214) 767-2666 | Verbal - Immediately Written - Post Cleanup |

| Spill Location | Agency | Telephone | Notification Requirement |
|--|---|--|--|
| Louisiana (w/in 3 miles of shore) | Dept of Env. Quality State Police | (504) 342-1234 (504) 925-6595 | Verbal - Immediately Written - Post Cleanup |
| Texas (w/in 3 leagues or 10.35 miles of shore) | Railroad Comm. District | | Verbal - Immediately Written - Post Cleanup |

D. Reportable Quantity of a Hazardous Substance

Note that the reportable quantity for a 24-hour period can range from as little as one pound to as much as 5,000 pounds of the particular material. 40 C.F.R. Parts 116 and 117. (Note that these regulations apply only to accidental releases of hazardous substances. Intentional non-emergency or routine releases of the substances are covered by the NPDES permit process. 40 C.F.R. § 117.12(a)(3). See, Appendix C for those hazardous substances most likely to be used in OCS operations.

E. Notification of Management and Coowners

Do not forget to notify your own management of the incident so that they may activate the OSCP. [See, Article XII.K.6.] Also review any relevant contracts such as operating agreements or boat charters in order to ascertain any obligations to coowners.

F. Accident Reports

Notify both the MMS District Supervisor and the U.S. Coast Guard whenever any serious accident, death, injury, explosion, blowout, or fire occurs. 30 C.F.R. § 250.19 and 33 C.F.R. § 146.30. If an offshore pipeline is involved also contact the Office of Pipeline Safety, Department of Transportation. 49 C.F.R. Part 191 or Subpart 195.50. See Article XVI.N *infra* for further detail on pipeline reporting requirements.

G. Reports on Revised Well Operations: 30 C.F.R. § 250.65

As noted *supra* in Article VII Drilling for Oil and Gas, a Lessee must file a MMS Form 331C prior to actual drilling operations. However, do not overlook a second MMS obligation to report to the District

Supervisor any substantial change in the originally approved plan or equipment used thereunder.

H. Casinghead Pressure: 30 C.F.R. § 250.87(c)

An OCS Lessee must immediately report to its local MMS District Supervisor any well which has sustained pressure on its annulus. *Id.* The District Supervisor will likely require action by the Lessee to reduce or remove any significant pressure buildup. This often requires rig assistance. Failure to comply with the MMS request may result in the offending well being shut-in, or even result in an order to plug and abandon the well. Pressure in the annulus area of a well is a potentially serious problem. However, the MMS zeal to enforce this post-April 1988 requirement has proven to be costly to OCS Lessees.

The API is seeking revision of 30 C.F.R. § 250.87(c) to exempt de minimis casing pressure situations from their reporting requirements. The MMS will hopefully publish an NTL shortly to that effect.

"De minimus" casing pressure will likely be defined as a well having casing pressure below 1000 psi or below 20% of the API internal pressure rating, whichever is lower, *and* which can be bled to 0 psi through a 1/2 inch needle valve in less than 30 minutes for gas wells, or with less than 21 gallons liquid production for condensate or oil wells.

I. Notification of Release of Hydrogen Sulfide: 30 C.F.R. § 250.67(h)(9)

Notify the MMS and U.S. Coast Guard as soon as possible of any non-routine release of H₂S over 20 ppm and 50 ppm respectively.

J. Offshore Oil Pollution Compensation Fund Fee: 26 C.F.R. § 301.9001-1

A Form 6009, Quarterly Report of Fees Due on OCS oil production under the provisions of the Fund must be filed at the Austin (Texas) Internal Revenue Service Center. For a discussion of the Fund *see* Article XII.J(6) *supra*.

K. Notice of New Facility: 33 C.F.R. § 146.10

The owner or operator of a new offshore facility must notify the District Commander, U.S. Coast Guard of the position, date of initial operations, and date the facility is available for inspection. *Id.*

L. Archaeological Resources: 43 C.F.R. Part 7

Although not a production reporting requirement *per se*, an OCS Lessee needs approval of the relevant agency head (that is almost always the DOI on the OCS) prior to engaging in activities that may disturb archaeological resources.

M. Offer of Liquids to Small or Independent Refiners: 43 U.S.C. § 1334(b)(7)

Often overlooked in post-1978 OCS leases is the requirement for an OCS Lessee to offer 20% of its liquids production from each OCS lease to small or independent refiners as defined by the Emergency Petroleum Allocation Act of 1973. The requirement will not likely become significant until there is another oil shortage.

N. Informal Reporting Requirements

Currently, the NMFS and the FWS are having certain OCS operators in the Gulf of Mexico informally monitor the presence and activities of loggerhead and other sea turtles in and around platform complexes. There are 15 operators participating in the observer program which is slated to run through September 1990. These studies lead logically to the next topic, the abandonment and removal of offshore structures.

XIV. Abandonment of Offshore Structures and Wells

A. Removal of Offshore Platforms and Structures: 30 C.F.R. § 250.143

1. Summary. OCS Lessees are required to remove platforms and structures once operations cease. However, endangered or threatened species may be affected by the removal operations and such actions may be prohibited by the Endangered Species Act or the Marine Mammal Protection Act.

For that reason, on October 30, 1989, the API submitted to the National Marine Fisheries Service of the Department of Commerce a formal petition to institute rulemaking under the Marine Mammal Protection Act. The API is seeking the

promulgation of regulations that will provide OCS Lessees with protection from prosecution for incidental takes of marine mammals during platform abandonment operations. The lengthy process will take at least two years.

Traditionally, Lessees towed the removed structures to shore for salvage. However, in recent years interest in using obsolete oil and gas structures as artificial reefs has grown. In response to this movement, relevant international, federal, and state laws have been revised to accommodate this alternate method of disposal.

2. **International Law.** The current platform removal requirement is based on international treaty obligations such as Article 5 of the 1958 Geneva Convention on the OCS: "Any installations which are abandoned . . . must be entirely removed." *See also*, Article 60(3) of the United Nations Law of the Sea Convention.

However, the Subcommittee on Safety of Navigation of the IMO recently endorsed a new set of "Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone." The proposed IMO guidelines require removal of small platforms of 4,000 tons or less in up to 75-foot water depths, but allow exceptions for structures used as artificial reefs.

The IMO issued these decommissioning guidelines worldwide in an advisory circular in late 1989. The guidelines will be voted upon by the IMO assembly in early 1990.

This is the first time that an international body has explicitly provided for the creation of artificial reefs to enhance living marine resources.

3. **The MMS Platform Removal and Location Clearance Requirements.** 30 C.F.R. § 250.143; Section 22 of OCS Lease Form MMS-2005. "The Lessee shall remove all structures in a manner approved by the Regional Supervisor to assure that the location has been cleared of all obstructions to other activities in the area." 30 C.F.R. § 250.143(a).

Structures must be removed within one year either of termination of the entire lease, or after termination of the portion of the lease upon which the structure is located. The

Lessee may however petition the MMS Director to maintain structures after termination of the lease in order to drill or produce on adjacent leases. Section 22 of OCS Lease Form-2005.

Structures must be removed to a depth of at least 15 feet below the seafloor or as otherwise approved by the Regional Supervisor. 30 C.F.R. § 250.143(b). This generally requires the use of explosives.

After the clearance operations the OCS Lessee must submit a location clearance survey to the Regional Supervisor. 30 C.F.R. § 250.143(c). Note, that the MMS is currently drafting a NTL which will address the minimum acceptable survey area and clearance verification methods such as trawling over the area.

4. Environmental Restrictions. Certain environmental laws apply to removal operations. The NEPA, 42 U.S.C. §§ 4321-4370, creates general environmental impact statement requirements which are applicable to the OCS Lease Sale planning process, including platform installation and removal activities.
5. The Endangered Species Act (ESA). 16 U.S.C. § 1531-1544, 1973. Enacted into law in late 1973, the ESA protects and preserves both the species and habitats of fish, wildlife, and plants "which are in danger of or threatened with extinction." 16 U.S.C. § 1531(b).
 - a. The ESA prohibits "taking" a species which has been identified as "endangered." 16 U.S.C. § 1538(a); 50 C.F.R. §§ 17.21 and 17.61. The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

The Secretary of the Interior has interpreted "taking" to include not only a direct physical injury, but to include injury by habitat modification, and has been upheld on such a determination. *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). Also, "harm" need not be shown by death of individual members of a species, but may be shown by a severe decline in the population over time. *Sierra Club v. Ling*, 694 F. Supp. 1260 (E.D. Tex. 1988). Query: Does

removal of an offshore platform constitute "habitat modification" even though the platform was not part of the original habitat in the area? The claim has not been asserted.

- b. The ESA Section 7 Consultation Procedure. 50 C.F.R. Part 402. "Each Federal agency shall confer with the Secretary (of Interior or Commerce as applicable) on any agency action which is likely to jeopardize the continued existence of (an endangered species) . . . or result in the destruction or adverse modification of critical habitat...." 16 U.S.C. § 1536(a)(4). "Agency action" includes the issuance of any federal permit. (See also Robert Thornton, *Takings Under Endangered Species Act Section 9*, 4 Natural Resources and Environment 7 (Spring 1990) for a discussion of Section 9 which prohibits "any person" from "taking" an endangered or threatened species).

Necessity of Biological Opinion and Incidental Take Statements. The NMFS has issued a generic biological opinion. Also, under section 10 of ESA a Lessee may apply for an Incidental Take Permit where the "taking" is "not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

- 6. Marine Mammal Protection Act (MMPA). 16 U.S.C. § 1361 (1972). The MMPA implemented a moratorium on the "taking" of depleted species of marine mammals. The Act as originally enacted into law permitted no incidental takes of depleted species. Under section 3(1)(C) of the MMPA all endangered and threatened marine mammals are by definition depleted. The 1986 Amendments to the MMPA revised section 101(a)(5) (as well as sections 7(b)(4) and 7(o) of ESA) to permit such incidental takes. The jurisdictional agencies under the MMPA, both the Fish and Wildlife Service (FWS) and the NMFS Regulations have recently published a final rule which implements this requirement. 50 C.F.R. Parts 18, 228, and 402; 54 Fed. Reg. 40,338 (September 29, 1989).

Non-Depleted Species. Permits to take non-depleted species are issued pursuant to 16 U.S.C. § 1374 and 50 C.F.R. § 216.33.

7. Shared Jurisdiction under and Distinction between ESA and MMPA. The FWS, the DOI, the NMFS, and the NOAA share responsibilities under the two above laws. The NMFS is responsible for species of the order Cetacea (whales and dolphins) as well as the suborder Pinnipedia (seals and sea lions, but excluding walruses). The FWS is responsible for the dugong, manatee, polar bear, sea otters, and walrus.

Theoretically, the two laws apply to separate areas of activity. Section 101(a)(5) of the MMPA allows the taking of marine mammals incidental to activities other than commercial fishing. Section 7(b)(4) of the ESA allows the taking of endangered and threatened species incidental to activities that have federal involvement or control. However, in OCS activities, that distinction may blur, since every activity on the OCS in theory derives from a federal permit or action. *See* Subsection 8 below.

8. The MMPA Section 101(a)(5) Process. The relevant agency may allow the taking of a small number of marine mammals incidental to an activity (other than commercial fishing) in a distinct geographic area. However, the route to obtaining such authorization is arduous since it requires the actual publication of regulations. 50 C.F.R. §§ 18.27 and 228.2.
 - a. Initiation of Process for Incidental Taking. First, file a written with the proper agency (depending upon the specie(s) that will be affected) requesting specific regulations to govern such taking. *Id.* Substantial and detailed information must accompany the request. *See*, 18 C.F.R. §§ 18.27(d) and 228.4.
 - b. Evaluation of Proposal. The FWS or the NMFS does *not* evaluate only the impacts of the individual's proposed activity on the depleted specie(s). The agency will evaluate the request based on the impact of *all* persons in the specified area conducting the particular activity. 50 C.F.R. §§ 18.27(d)(3) and 228.4(c).
 - c. Applicable Regulations. Subject to certain agency findings, regulations will be published which establish methods of taking, minimize impact upon the specie(s), and create monitoring and reporting requirements. 50 C.F.R. §§ 18.27 and 228.2. Thereafter, a person may

apply for letters of authorization under the newly published regulations. 50 C.F.R. §§ 18.27(f) and 228.6

- d. Processing Time. Both agencies estimate that the regulatory process time will take at a minimum probably one year. 54 Fed. Reg. at 40,338. This is, of course, assuming that no third party challenges the biological opinion process, a favorite hunting ground for special interest groups. *See e.g., Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), or *Tribal Village of Akutan v. Hodel*, 859 F.2d 651 (9th Cir. 1988), for the various methods of attacking the biological opinion process and the delays that the challenges caused to the ESA process.

So it is essential that each OCS Lessee check for the presence of depleted specie(s) around its facilities and coordinate platform and other facility removal operations with the relevant operational departments well in advance of the actual removal date.

9. The Relationship Between the MMPA Section 101(a)(5) Process and the ESA Section 7 Consultation Process. Under subsection 7(a)(2) of the ESA, a federal agency must consult with the relevant Service to insure that any action that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. The federal agency initiates formal consultation similar to a private party under the MMPA by a written request to the relevant agency, the FWS or the NMFS, and including detailed information about the potential effects of the proposed action.

A consultation process ensues, which should be completed within 90 days. After consultation the FWS or NMFS issues its biological opinion which assesses *inter alia* whether or not the proposed action will likely jeopardize endangered or threatened species, or destroy or adversely modify critical habitat.

If the FWS or the NMFS concludes that the above is not likely to occur, but that an incidental take of species may occur, then the relevant agency includes an incidental take statement in its biological opinion. Section 7(b)(4) of the ESA.

Theoretically, that should resolve the problem. However, Congress amended Section 7(b)(4) of ESA in 1986 to require that the provisions of Section 101(a)(5) must be satisfied before an incidental take of endangered or threatened marine mammals is allowed.

Coordinating the 90-day ESA consultation procedure with the yearlong 101(a)(5) regulatory process is an obvious problem. The FWS and the NMFS offer various methods to minimize the duplication and waste of time in the preamble to the final regulations. *See*, 54 Fed. Reg. 40,338, 40,346 (September 29, 1989).

B. Liability for Platform Removal

The Lessee is required to remove any structures once operations have ceased. 30 C.F.R. § 250.143. Ostensibly, the Lessee is liable for the costs of the removal of such structures. Section 21 OCS Lease Form MMS-2005 (March 1986).

The issue becomes more difficult if due to a sale, assignment, or farmout the original OCS Lessee does not own the lease. Is the original OCS Lessee liable for platform removal costs if his assignee fails to perform his responsibilities?

Any transfer of interest in an OCS lease to a third party or an affiliate of the current OCS Lessee must be approved by the MMS. 30 C.F.R. § 256.62. By regulation, the MMS approval date of the assignment determines the date when the assignee becomes liable for obligations under the lease. 30 C.F.R. § 256.62(e). Thus, the MMS regulation varies slightly from the traditional rule in contract law that an assignment will not discharge the assignor's liability under the contract for defective performance by the person delegated. Restatement of Contracts Sec. 160.

However, 30 C.F.R. § 256.62(d) states that "the assignor shall remain liable for all obligations under the lease accruing prior to the approval of the assignment." Did the obligation to remove the platform "accrue" prior to the assignment?

Until recently, the issue was unclear. However, the MMS released an internal memorandum from the Director of the MMS to the Regional Supervisor, Gulf of Mexico Region dated November 6, 1989, (*see*, Appendix D), and also proposed to revise 30 C.F.R. § 256.62(e) in an effort to clarify the situation. 55 Fed. Reg. 2388 (January 24, 1990).

In the memorandum, the Director of the MMS stated that an unconditional approval of assignment of an OCS lease frees the assignor of any future liability related to the lease, including platform abandonment costs. However, the Director noted that the Regional Supervisor has the power to condition approval of any assignment upon the assignor maintaining plugging and abandonment bonds and/or related plugging abandonment liability.

A more likely and much less palatable scenario is that the MMS simply will not approve any assignment unless the proposed assignee can meet the increased bonding requirements contained in either Notice To Lessees 89-07 Supplemental Bonds dated December 15, 1989, or in the proposed 30 C.F.R. § 256.62(e). Until those requirements are met and the assignment is approved, the assignor remains liable for activities that occur on the lease even if he physically no longer operates the lease. For that reason make sure that the proposed assignee can demonstrate the ability to meet the soon to be new bonding requirements prior to letting that party onto the lease. Otherwise, the MMS (private litigants will attempt to bootstrap any claim against the Lessee too) will hold you as Lessee of record vicariously liable for everything that occurs on the lease.

There is one potential exception to the above discussion and that involves U.S. Coast Guard regulations which implement Section 311 of the CWA. 33 C.F.R. Subpart 153. Subsection 153.405 makes both the owner or operator of a vessel or offshore facility from which a discharge occurs liable for both federal and state agency cleanup costs. *Id.* See also, 33 U.S.C. §§ 1321(f),(g), and (i). The CWA is specific in stating, however, that the above provisions shall not apply in any case where liability is established under the OCSLA, as amended. 33 U.S.C. § 1321(i)(2). That presumably includes the Offshore Oil Spill Compensation Fund which was established under Title III of the 1978 Amendments to the OCSLA. 43 U.S.C. § 1811. However, the citation contained in the CWA cites only the main body of the OCSLA, as amended, 43 U.S.C. § 1331. This suggests that Congress did not intend the Fund to be considered to be part of the OCSLA per se. Indeed, 43 U.S.C. § 1820(c) states that creation of the Fund did not preempt claims under other liability laws.

Thus, unconditional MMS approval of an assignment under 30 C.F.R. § 256.62 may not shield the assignor from potential vicarious liability for oil spills under the CWA and implementing U.S. Coast Guard regulations.

C. Liability for Post-Lease Section 22 Structures

Under Section 22 of OCS Lease Form-2005 a Lessee may petition the MMS to maintain on-lease structures after the lease has expired. What if another party purchases that lease and the initial Lessee fails to remove the structures already in place. Would the subsequent Lessee be liable for removal of the structures? The answer appears to be yes.

The federal OCS lease form does not contain a warranty of title warranting the condition of the acreage which the individual has leased. Moreover, the MMS may interpret sections 21 and 22 of the lease to require the current Lessee to remove all wells and structures which are present on the leased acreage. Another possible tack is that the MMS may claim that relevant state statutory plugging obligations are applicable to the OCS where no contrary federal authority exists. Certain states such as Texas impose a statutory duty upon current non-operators to plug and abandon wells if the operator fails to carry out its obligation. Texas Nat. Res. Code Ann. Section 89.042. *See, also* A. Mitchell, *A Duty to Plug -- The Deep Pocket Theory*, 9 Eastern Min. Law Found. 20-1 (1988).

How does one avoid liability for structures left over on an OCS lease by a previous Lessee? First, verify that the previous Lessee has met and is continuing to meet the MMS bonding requirements under 30 C.F.R. § 256.58. Although the MMS only currently requires a \$300,000 area-wide bond, those requirements are proposed to be increased to as high as \$3,000,000 shortly partly in order to avoid this problem. 55 Fed. Reg. 2388 (January 24, 1990).

Second, the OCS Lessee should attempt to negotiate a special stipulation into its lease prior to signing the lease which addresses the presence of and liability for removal of such structures.

D. MMS Regulation of Abandonment of Wells and Site Clearance Verification: Subpart G, 30 C.F.R. §§ 250.110-114

1. Summary. The MMS as lessor takes a somewhat novel approach prior to authorizing abandonment of an individual producing well. A Lessee must first demonstrate that a production well is no longer capable of further economic production before the well may be abandoned. 30 C.F.R. § 250.110. Similarly to the ESA and the MMPA processes which must be satisfied prior to abandonment of a platform, an OCS

Lessee should recognize that satisfying the following requirements may also inhibit the Lessee's operational plans.

2. **Abandonment of a Well.** Lessee must submit to the MMS District Supervisor a request to abandon any well on a Form MMS-332 Notice of Intent/Report of Well Abandonment prior to any abandonment operations. The request must include supporting well logs and test data along with a description of the proposed abandonment procedure, and depths, types, location, and lengths of proposed plugs. 30 C.F.R. § 250.111.
3. **Temporary or Permanent Abandonment.** There are different rules applicable to either a temporary or permanent abandonment of a well. See 30 C.F.R. § 250.112 (permanent) and 30 C.F.R. § 250.113 (temporary) for the plugging, zone, open hole, and perforated interval isolation, and clearance requirements.
 - a. **Plugging or Isolating Perforated Intervals.** In either case, the MMS regulatory revisions expanded the Lessee's options to include setting a cement plug of at least 200 feet by displacement method. The bottom of the plug must be within 100 feet of the top of the perforated interval. 30 C.F.R. § 250.112(c)(3).
 - b. **Fluid Left in Hole.** In either case, fluid left in hole between abandonment plugs shall be of a sufficient density as to exert a hydrostatic pressure exceeding the greatest formation pressure in the interval between the plugs at the time of abandonment. 30 C.F.R. § 250.112(h).
4. **Temporary Abandonment - Site Clearance and Annual Report.** There are no site clearance requirements if a Lessee only temporarily abandons a drilling well. However, obstructions which remain above the seafloor after the well has been temporarily abandoned must be protected as to allow commercial fisheries gear to pass over without damage. 30 C.F.R. § 250.113(b).

Within one year of temporary abandonment, and annually thereafter, the Lessee must file a report with the MMS District Supervisor of its plans to reenter and complete or permanently abandon the well. 30 C.F.R. § 250.113(c).

5. Permanent Abandonment - Site Clearance and Verification. Unless otherwise approved by the MMS District Supervisor, all wellheads, casings, pilings, and other obstructions must be removed to a level of 15 feet below the mud line. 30 C.F.R. § 250.112(i). A site clearance verification must be conducted, and the results submitted to the MMS District Supervisor on the Form MMS-332. 30 C.F.R. § 250.114.

E. Rigs-To-Reefs Program

1. Summary. In 1984 Congress passed and President Reagan approved the National Fishing Enhancement Act of 1984. 33 U.S.C. §§ 2101-2106. The Act *inter alia* encouraged the recycling of outmoded oil and gas structures located offshore as artificial reef habitats. The Act required the Secretary of Commerce in consultation with various other federal agencies including the Department of Defense, DOI, the EPA, the U.S. Coast Guard, and local Fishery Management councils to develop a National Artificial Reef Plan. 33 U.S.C. § 2103.

The Secretary of Commerce published the Plan in November 1985. The Plan established a national policy regarding artificial reefs and established guidelines for the design, siting, permitting, construction and management of artificial reefs. The Department of Commerce also encouraged States to develop parallel State plans which would account for local conditions. Both the states of Louisiana and Texas responded with concomitant legislation. La. Rev. Title 56:639; Texas Parks and Wildlife Chptr. 89.

2. Permit Procedure and Applicants. The Secretary of the Army is responsible for issuing a permit for an artificial reef on the OCS, as well as any dredge and fill permit which is necessary to complete the construction. 33 U.S.C. § 2104. The EPA in issuing any NPDES permit related to the design, siting, construction, operation maintenance, monitoring, or managing of an artificial is required to consult with the Secretary of the Army in order to make sure that the NPDES permit is consistent with the terms of the artificial reef permit. *Id.*

Who may apply for a permit? Actually, anyone may apply for a permit. Realistically, the applicants are likely to be an OCS Lessee or a federal or state government agency. Texas state law, in fact, specifically authorizes the Parks and Wildlife

Department to serve as a permittee. Tex. Parks and Wildlife Sec. 89.003.

3. State Artificial Reefs Programs. In July 1986, the state of Louisiana enacted the Louisiana Fishing Enhancement Act. The law established a State Artificial Reef Program and required the state to develop a plan covering both state and federal waters off of the Louisiana coast. The Program established eight artificial reef planning on the OCS, offshore Louisiana, three sites of which have already received former platforms.

In May 1989, the state of Texas enacted an artificial reef law patterned upon the Louisiana Act. The Texas Act created an artificial reef plan advisory council and trust fund to encourage development of an artificial reef program off the Texas coast.

Both state laws require any artificial reef located on the federal OCS to be consistent with the National Fishing Enhancement Act. 33 U.S.C. § 2101. Both state laws establish regimes similar to the federal Department of Commerce's National Artificial Reef Plan to regulate placement of structures in state offshore waters. See *e.g.*, Tex. Parks and Wildlife 89.021.

4. Liability and Logistical Concerns. Logistically speaking the bulk of the cost to remove a platform and to tow it ashore for salvage is in the removal operations themselves -- i.e., the costs for blasting the well casings and platform free and the costs for the liftboats necessary to maneuver the freed platform onto a barge. The costs of towing are a minimal portion of the entire project. Thus, financial factors do not heavily influence the decision of bringing a platform back onshore for salvage versus sinking the platform offshore.

Cognizant of this fact, both the federal and the state laws offer some protection against liability for the permittee who sinks a platform in order to create an artificial reef. The National Fishing Enhancement Act of 1984 offers limited protection for the OCS Lessee whether the Lessee sinks the platform on its own behalf or as agent for a governmental entity which is a permittee under the Act: "A person to whom a permit is issued in accordance with . . . this section and any insurer of that person shall not be liable for damages caused by activities

... under ... the permit, if the permittee is in compliance with such terms and conditions." 33 U.S.C. § 2104(c)(1).

If the OCS Lessee transfers title to the platform to a third party, the law offers protection from claims "if such materials meet applicable requirements of the (National Artificial Reef) plan published under section 2103 of this title and are not otherwise defective at the time title is transferred." 33 U.S.C. § 2104(c)(4) (emphasis added). The protection offered by the above language cannot be called "sweeping." One should seek clarification and additional protection in the terms of any permit issued by the Secretary of the Army under the law prior to releasing a former platform for use in the program.

How about the state programs? Does the language in those programs offer any additional protection from claims for damage or personal injury arising as a result of utilizing a platform to create an artificial reef? The answer is no. Both the relevant Louisiana and Texas statutory language references the standard contained in the federal law exculpate the person who transferred title to the platform to the permittee only if relevant federal regulations are satisfied. If the OCS Lessee is the permittee itself, then neither state law offers exculpatory language similar to 33 U.S.C. § 2104(c)(1) for artificial reefs located in state waters. Thus, the safest interpretation is that some liability may still exist for an OCS Lessee who sinks a platform in either federal or state waters as part of the rigs-to-reefs program.

XV. Offshore Structures, Vessels, and Applicable Law

Admiralty and maritime law constitutes a long-established body of law which deals with accidents, property damage, and personal injury which occurs on or around navigable waters. Since most OCS related facilities are located either offshore in navigable waters or at shorebases adjacent to navigable waters, and since vessels and mobile drilling rigs are usually similarly in or on navigable waters when problems arise, a basic familiarity with admiralty and maritime rules is necessary for the offshore practitioner. However, since there are numerous excellent treatises already available, this manual will only review the basic rules in the area and then cite the reader to additional sources.

Three bodies of law are potentially applicable to different aspects of offshore operations: state law, federal law, and admiralty or maritime law.

A. Area Dividing Lines

The relevant "area" dividing lines for offshore oil & gas operations are determined by provisions contained in the OCSLA, as amended, 46 U.S.C. §§ 1331-1315, and Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1982).

1. The OCS is comprised of submerged lands lying seaward and outside a line generally three geographical miles from the state's coast. Those lands are subject to federal jurisdiction under the OCSLA. 43 U.S.C. § 1331(a); and 43 U.S.C. §§ 1301-1356 (1982).
 - a. The "coastline" is that portion of the coast which is in direct contact with the open sea. 43 U.S.C. § 1301 (1982).
 - b. Demarcation of "Coastlines". A Special Master appointed by the United States Supreme Court establishes each state's coastline. For example, the Supreme Court in *United States v. Louisiana*, 422 U.S. 13 (1975), established the Louisiana coastline.
2. The OCSLA does not affect "the character of the waters above the OCS as high seas and the right to navigation and fishing therein" 43 U.S.C. § 1332(2).
3. "Submerged lands" within the three-mile state limit (some States such as Texas and Florida control a slightly larger area) are owned by and subject to administration of the respective states in accordance with applicable state law. 43 U.S.C. § 1311.
4. Thus, there are three jurisdictional "areas":
 - a. Submerged lands within the three-mile limit or the "territorial area";
 - b. Submerged lands on the OCS; and
 - c. Navigable waters, which include both territorial waters (the water column above the territorial area) and the high seas.

5. Territorial and OCS "submerged lands" have been divided into areas and blocks for oil & gas leasing purposes. The areas are named and the blocks within the areas are numbered.

B. Applicable Law

1. "Territorial Area," including artificial islands or fixed platforms attached thereto: state law.

Article 4, Section 4 of the United States Constitution guarantees every State in the Union a "Republican Form of Government" which includes the right to enact laws for its territory. *See also*, 43 U.S.C. § 1311.

2. The OCS area, including artificial islands or fixed platforms: State law is applied as surrogate federal law, unless the state law is inconsistent with a particular federal law. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 356-57 (1969).
 - a. "The Constitution and laws . . . of the United States are hereby extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . ." 43 U.S.C. § 1333(1).
 - b. The "laws" referred to in subsection (1) of § 1333 are, for the purposes of tort, excluding employer liability, and contract disputes, the laws of the adjacent state pursuant to subsection (2)(A) which states:

"To the extent that they are applicable and not inconsistent with this subchapter or with other federal laws and regulations . . . the civil and criminal law of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of

the Outer Continental Shelf" 43
U.S.C. § 1333(2)(A).

- i. No Choice-of-Law. The OCSLA's directive to apply the laws of the adjacent state does not require application of the adjacent state's choice-of-law rules to determine substantive law. The OCSLA contains an explicit choice-of-law provision *requiring* application of the substantive law of the adjacent state. *Wooten v. Pumpkin Air, Inc.*, 869 F.2d 848 (5th Cir. 1989); *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043, 1050 (5th Cir. 1990); *in accord*, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-103 (1971).
 - ii. Statutes of Limitations. Statutes of limitations are considered part of the relevant state's substantive law and are applied rather than the federal common law doctrine of laches. *Chevron Oil Co.*, 404 U.S. at 101-102.
- c. Claims of employees against employers are governed by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) pursuant to § 1333(b) of the OCSLA which reads: "With respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the Outer Continental Shelf . . . compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 *et seq.*]." 43 U.S.C. § 1333(b). Note also that the National Labor Relations Act is also incorporated into the OCSLA, as amended. 43 U.S.C. § 1333(c).
- i. For example, *Masinter v. Tenneco Oil Co.*, No. 87-3638 (5th Cir. 1989) where a sales representative was injured on an offshore jackup drilling vessel. Although the plaintiff was neither a seaman nor a longshoreman, his compensation remedy was under the LHWCA.
 - ii. "Employee" does not include a master or member of a crew of any vessel" 33 U.S.C. § 902(3).

- iii. Area of Applicability. 33 U.S.C. § 903(a). The LHWCA coverage is applicable not only to navigable waters, but also to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

3. Navigable Waters: Admiralty or Maritime Law.

Article 3, § 2 of the United States Constitution extends the "judicial power of the United States" to "all cases of admiralty and maritime jurisdiction." Generally, admiralty jurisdiction exists if a tort occurs on navigable waters and bears a significant relationship to traditional maritime activity. The concept may be stretched beyond what one would normally consider "navigable waters" or "traditional maritime activity" as reflected *e.g.*, in the case of *Placid Oil Co. v. Sanders*, Case No. 85-4704 (5th Cir. 12/22/88). In that case, the federal trial court found, and the Fifth Circuit affirmed that admiralty jurisdiction existed where two duck hunters in a boat struck a submerged unmarked pipe which had been driven into a lake bottom by Placid and one of the hunters injured his knee.

- a. The applicable admiralty and maritime area is defined by the determination of whether a body of water is "navigable in fact."
- b. The "three-mile limit" does not apply to this jurisdiction. It exists both inland and seaward of the three-mile limit as to any "navigable water."

C. Tort and Contract Law Applicable under each Body of Law

- 1. "Territorial area" (land or fixed platform within three-mile limit), in the State of Louisiana, *e.g.*:
 - a. Civil Code arts. 2315, for tort claims, including art. 2322 and the concept of a "ruin", but excluding employer liability; and the Louisiana Civil Code generally for contract interpretation.
 - b. Louisiana Workers' Compensation Act, La. R.S. 23:1021 *et seq.*, for injuries or death of employees. Tort claims against an employer are precluded except in cases of

intentional tort. Contractual agreements may circumvent immunity. *See, e.g., Rodrigue v. Legros*, 563 So. 2d 248 (La. 1990).

The Louisiana Oilfield Indemnity Act, an anti-indemnity statute relates to personal injuries involving offshore contractors. La. R.S. 9:2780. *See also* Tex. Civil Practices and Remedies Section 127 for a similar anti-indemnity statute. Note also, in drafting indemnity agreements that Texas follows the express negligence doctrine, so that *if* indemnity against a party's own negligence may be achieved, then the indemnity clause must contain an express statement to that effect. *See e.g., Ethyl Corporation v. Daniel Construction, Co.*, 725 S.W.2d 705 (Tex. 1987); *Atlantic Richfield Co. v. Petroleum Personnel Inc.*, 768 S.W.2d. 724 (Tex. 1989); and *Payne and Keller v. PPG Industries, Inc.*, No. C-8711 (Tex. June 20, 1990).

2. The OCS Area (Fixed Structures on the Federal OCS):

- a. Generally, the OCSLA, as amended, adopts adjacent state law as federal law for tort claims, excluding employer liability, and contract claims. 43 U.S.C. § 1333(a)(2)(A). In effect, the same as subparagraph D(1)(a) above.
- b. The LHWCA, as required by the OCSLA, as amended, covers injuries or death of employees "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the outer Continental Shelf." 43 U.S.C. § 1333(b). Thus, tort claims against an employer, including the non-operating members of the joint venture, are precluded. *Davidson v. Enstar Corp.*, 848 F.2d 574 (5th Cir. 1988); *but cf. Thompson v. Teledyne Movable Offshore Inc.*, 419 So. 2d 822 (La. 1982) where the Louisiana Supreme Court decided that concurrent jurisdiction existed and that *both* the state and federal compensation remedies could apply.

Contractual agreements may circumvent immunity, but are subject to *e.g.*, the Louisiana Oilfield Indemnity Act and the Texas Anti-Indemnity Act. For a discussion of

these anti-indemnity statutes as applied to offshore contracts, see Tade, *The Texas and Louisiana Anti-Indemnity Statutes as Applied to Oil and Gas Industry Offshore Contracts*, 24 Hous. L. Rev. 665 (1987).

c. Vessels Involved in Offshore Oil and Gas Support Activities.

One area of continual jurisdictional uncertainty involves Vessel activity under contracts involving offshore oil and gas operations. Which scheme of law governs contractual disputes, or injuries which occur when contractual obligations are being discharged - the OCSLA's statutory scheme, or traditional concepts of admiralty or maritime law?

The analysis most recently employed by courts essentially mimics the analysis used in determining when the LHWCA's scheme is applicable to a particular injury or death of an employee. To wit: does the dispute arise out of traditional maritime activity? *See, Herb's Welding Inc. v. Gray*, 470 U.S. 414, 423 (1985). The Supreme Court has also suggested consideration of the situs of the activity in Question: "Congress determined that the general scope of the OCSLA's coverage, . . . would be determined principally by locale, not by the status of the individual injured or killed." *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207, 219 (1986).

3. Navigable waters: (Vessels Generally)

- a. General maritime law applies to claims for bodily injury, excluding employer liability and death, between or among joint tort-feasors or those involving contracts.
 - i. Substantive content not set out in Constitution or statute. There is a body of maritime law "as old as navigation itself."
 - ii. Principles of the general maritime law are similar to tort law generally and often courts refer to the Restatement of Torts 2nd for guidance.

- b. Wrongful death claims did not exist in the "ancient" maritime law.
 - i. The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768, establishes a wrongful death action for the personal representative of the decedent against the vessel, person, or corporation liable for the death, when the death is caused by a wrongful act on the high seas beyond a marine league or the three-mile limit from the shore of any state, territory or dependency of the United States. Note that under the DOHSA, the decedent need not have been a seaman in the employ of a vessel. The *Black Gull*, 82 F.2d 758 (2d Cir. 1934).
 - ii. State Waters. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), judicially established wrongful death action for deaths occurring in territorial navigable waters, even if the decedent is not accorded seaman status.
- c. Employee remedies against employers provided by the Jones Act, general maritime law, and the LHWCA.
 - i. The Jones Act, 46 U.S.C. § 688, applies the provisions of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60, for the benefit of seamen. The Act provides that a "seaman" -- generally "a master or member of a crew of a vessel" -- a claim for bodily injury or his "beneficiaries" a wrongful death action for negligence chargeable to such employer or against any company for whom his employer was working. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975).
 - ii. Seaman Status. The determination of "seaman" status under the Jones Act is a fact question. A worker qualifies for such status if "the employee . . . is assigned permanently to a vessel or perform(s) a substantial part of his work on the vessel." *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067 (5th Cir. 1986).

- iii. *See, e.g., Wilander v. McDermott International Inc.*, 887 F.2d 88 (5th Cir. 1989), wherein a paint foreman on a paint boat who oversaw sandblasting and painting on offshore platforms was entitled to "seaman" status under the Jones Act. The case reflects the difficulty of determining just who is or is not entitled to relief under the Jones Act.
- iv. No Assumption of Risk or Contributory Negligence Defense. Comparative negligence is utilized for claims brought actually under either the Jones Act or General Maritime Law.
- v. General Maritime Law. A "seaman" is also entitled under General Maritime Law to "maintenance and cure" for bodily injury, basically a "compensation" type remedy, due to the unseaworthiness of the vessel on which he served. Under General Maritime Law, a vessel owner has an absolute, non-delegable duty to furnish a sea-worthy vessel, i.e., a vessel reasonably safe and fit in hull, gear, appliances, ways, appurtenances, and manning for its intended purpose. *Mahnich v. Southern Steamship Co.* 321 U.S. 96 (1944).
- vi. Liability Without Fault. The vessel owner's duty to maintain a seaworthy vessel is absolute and exists regardless of the vessel owner's fault. If an unseaworthy condition is present and is the proximate cause of the injury, then exercise of due diligence or reasonable care does not relieve the owner of his obligations to provide a seaworthy vessel. *See Norris, The Law of Seamen*, Vol. II § 614, at 171.
- vii. The LHWCA provides compensation remedy against employers of employees who are not "seaman" but who work over navigable waters (situs) in furtherance of maritime commerce (status).
- d. Independent Contractor Doctrine. The independent contractor doctrine is still of force and vitality on the

OCS, although one must be aware of potential vicarious liability for safety or oil spill related issues which may arise under applicable federal statutes or regulations.

See, *Zepherin v. Conoco Oil Co.*, 884 F.2d 212 (5th Cir. 1989), wherein a roustabout on a drilling crew on an OCS platform was injured while being lowered in a personnel basket to a supply vessel in order to unload it. Conoco had no control over either the drilling operations or the unloading of the vessel. The Fifth Circuit held that a principal who hires an independent contractor, over which it exercises no operational control, has no duty to remedy hazards created by its independent contractors. In addition, the court found that Conoco had no liability as time charterer of the supply vessel. "A time charterer who does not control the operation and navigation of a chartered vessel is not responsible for the vessel owner's negligence or for damages arising out of operation of the vessel." *Id.* at 213.

- e. Further Reading. See also, McCollam and Wiygul, *Contract Actions and the Outer Continental Shelf Lands Act: Jurisdiction, Venue, and Applicable Law*, 38 Institute on Oil & Gas Law and Taxation 3-1; Ernst, *Admiralty and Maritime Personal Injury Claims*, FIC Quarterly Summer 1980; and Ernst, *Recent Developments in Admiralty and Maritime Law*, FIC Quarterly, Fall, 1982; and Note, *Contractual Indemnity under Maritime and Louisiana Law*, 43 La. L. Rev. 189 (1982).

For a discussion of the divided damages rule and the applicability of comparative negligence to joint tortfeasors to maritime casualties see Yeates, Dye Jr., and Garcia, *Contribution and Indemnity in Maritime Litigation*, 30 S. Tex. L. Rev. 215 (March 1989).

For a discussion of the Preferred Ship Mortgage Act and maritime liens see Hinds and Orlando, *Maritime Liens and the Law: Creation and Enforcement*, Texas A & M University - Sea Grant College Program, February 1988.

XVI. Pipelines, Gathering Lines and Rights-of-Way: 30 C.F.R. Subpart J, § 250.150 (superseding old 30 C.F.R. §§ 256.83-101)

Summary. Offshore oil & gas production can be transported to shore either by barge, tanker, or by pipeline. The choice of transportation depends upon a number of factors including the size and composition of production from the field, the distance to shore, weather and oceanographic conditions, proximity to refineries or gas processing plants, and presence of pipelines in the area. However, the majority of OCS oil and gas production is transported to shore by pipeline.

The DOT and DOI entered into a MOU on May 6, 1976, in order to clarify each agency's responsibility for offshore pipelines. 41 Fed. Reg. 23,746 (June 11, 1976). Basically, the DOT has jurisdiction over activities downstream of the outlet flange of any OCS production facility where hydrocarbons are first produced or separated, while the DOI exercises jurisdiction upstream of the outlet flange over gathering lines and production facilities.

The DOT has jurisdiction over pipeline safety issues, as well as the bulk transportation of materials by vessel. Separately, the U.S. Coast Guard regulates the transportation of hazardous materials by vessel, as well as the ports and waterways safety program.

The National Transportation Safety Board (NTSB), in contrast, functions only as an investigatory agency with investigatory authority over any transportation related accident, including pipelines. The NTSB has no enforcement authority; however its recommendations are given serious consideration by both DOT and DOI.

Note also that nearshore pipeline rights-of-way and permits for siting coastal dependent energy related facilities such as pipeline landfalls, marine terminals, and service support bases are subject to regulation by the respective state authorities, and also likely subject to a CZMA consistency determination with the exception of Texas which has not published a Coastal Zone Management Plan under the CZMA.

A. Easements for OCS Facilities Other than Pipelines

Easements for off-lease platforms, artificial islands, and similar exploration and production facilities are governed by 30 C.F.R. § 250.7.

B. Types of Pipelines

The revised MMS offshore operations regulations establishes three types of pipelines: "lease term pipelines; right-of-way pipelines; and DOI pipelines."

1. "Lease term pipelines" are completely on-lease or on-unit pipelines, or on contiguous leases of the same Lessee or operator. 30 C.F.R. § 250.151.
2. "Right-of-way pipelines" (ROW pipelines) are all other pipelines that e.g., cross unleased blocks or blocks owned by other parties. 30 C.F.R. § 250.151.
3. "DOI pipelines" are no more than gathering lines upstream of any platform or facility where the production is first treated. DOI pipelines can also qualify in either of the above categories. Additionally, similar lease-development pipelines such as gas lift gas or supply pipelines are considered "DOI pipelines." 30 C.F.R. § 250.150(c) codifying and expanding previous OCS Order 9.

C. General MMS Requirements - All Pipelines: 30 C.F.R. § 250.150

1. General Duty. The MMS requires pipelines and associated equipment to be "designed, installed, operated, maintained and abandoned to provide safe and pollution-free transportation of fluids in a manner which does not unduly interfere with other uses in the OCS." 30 C.F.R. § 250.150(a). Two comments are in order.
 - a. It is unclear why the above duties only relate to transportation of fluids but not gas.
 - b. The generic duty imposed by the MMS does not appear intended to interfere either with the Department of Transportation's jurisdiction over construction and operation of right-of-way pipelines or with the specific requirements imposed by DOT as discussed *infra*.
2. Suspensions.
 - a. Pipeline Operations. The Regional Supervisor may suspend any pipeline operation under the general power granted by section 5(a)(1) of the Act to suspend

operations whenever "continued activity would threaten or result in serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, mineral deposits, or the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1); 30 C.F.R. § 250.150(e)(1).

The pipeline (and underlying right-of-way grant) would not terminate due to, or during the period of the suspension. *See*, 30 C.F.R. §§ 250.10(b)(2) and (f).

- b. Pipeline Operations or Right-of-Way Grants. The Regional Supervisor may suspend either of the above "if [he/she] determines that the Lessee or right-of-way holder has failed to comply with a provision of the Act or any other applicable law, a provision of these or other applicable regulations, or a condition of a permit or right-of-way grant." 30 C.F.R. § 250.150(e)(2).

The major question under this provision is whether an operation or grant may be suspended for a violation of the Act unrelated to the operation or grant in question (similar to the Coal Leasing Amendments to the Mineral Leasing Act).

3. Cancellations.

- a. Pipeline permit or right-of-way grant. The Secretary of the Interior (i.e., this power is not delegated to the Regional Supervisor level) may cancel either a grant or permit pursuant to 43 U.S.C. § 1334(a)(2). 30 C.F.R. §§ 250.150(e)(3); 250.159(d).
- b. Note, that the grounds for canceling a permit or grant under 43 U.S.C. § 1334(a)(2), are much narrower than the grounds for which the Regional Supervisor may temporarily suspend operations under a permit or grant. 30 C.F.R. § 250.150(e)(2).

D. Pipelines and Pipeline Rights-of-Way: 30 C.F.R. §§ 250.150-250.164

A Lessee's on-lease pipelines or gathering lines are authorized by Section 2(c) of the current OCS lease form, Form MMS-2005 (August 1986), and are specifically excluded from the definition of pipelines which require "rights-of-way." 30 C.F.R. § 250.151.

1. The MMS governs the installation, modification and abandonment of "lease term pipelines." 30 C.F.R. § 250.150(b). Lease term pipelines must comply with the requirements contained in 30 C.F.R. §§ 250.150-158.
2. The MMS asserts exclusive jurisdiction over all aspects of the DOI pipelines.
 - a. The FERC Caveat. Note, however, a recent FERC decision involving Northern Natural Gas Company wherein the FERC stated that the gathering exemption in Section 1(b) of the NGA of 1938 only applies to the FERC's jurisdiction over certification and abandonment of gas sales arrangements, and not to its jurisdiction over the rates that can be charged for transportation of gas. *Northern Natural Gas Company*, 44 F.E.R.C. ¶ 61,384 (September 22, 1988).
 - b. The Northern Natural decision suggests that an OCS permit or lease holder should add a "FERC-out" clause to any third party gathering compression, or throughput agreements just in case the FERC in the future decides to regulate relevant rates.

E. Installation of Off-lease Structures

Installation of off-lease pipelines and accessory structures also require an MMS grant of a right-of-way. 30 C.F.R. § 250.150(b).

F. Requirements for DOI Pipelines

1. Design Requirements. 30 C.F.R. § 250.152. An internal pipeline design pressure formula must be met. The API standards for pipeline valves, flanges, and fittings are prescribed. Finally, a maximum allowable operating pressure for each of the above is established.
2. Installation, Testing, and Repair Requirements. 30 C.F.R. § 250.153.
 - a. Burial Requirements. Pipelines of greater than 8 5/8" in diameter and installed in water depths of less than 200 feet must be buried to a depth of at least three feet below the ocean bottom, unless the line is located in

congested or seismically active areas. 30 C.F.R. § 250.153(a)(1).

- b. **Monitoring Buried Pipelines.** In October, 1989, a fishing trawler hit an exposed gas pipeline off High Island, Texas. An explosion occurred, killing 11 crew members of the boat and injuring three others. A previously buried pipeline which may have subsequently have become exposed, may have contributed to the accident.

The NTSB is investigating the accident. As a result of the investigation, the DOT may impose new monitoring requirements on OCS gas pipelines. Current MMS regulations require a Lessee or right-of-way holder to submit a plan of corrective action if scouring, etc., "is observed to be detrimentally affecting a pipeline." 30 C.F.R. § 250.158(g).

The MMS requires the DOI pipelines to be inspected monthly for leakage and annually for pipe-to-electrolyte potential if protected by rectifiers or anodes. 30 C.F.R. §§ 250.155(a) and (b). Otherwise, the MMS regulations do not appear to impose ongoing review requirements for DOI pipelines as may be proposed by the DOT for OCS gas pipelines. This possibility should be kept in mind in computing the cost of installation of any DOI or OCS gas pipeline.

3. **Safety Equipment.** 30 C.F.R. § 250.154. Depending upon the pipeline's use, certain pressure sensors, block and flow valves may be required. Check this regulation for specific requirements for each type of pipeline use.
4. **Inspections.** 30 C.F.R. § 250.155. The Regional Supervisor shall prescribe for DOI pipelines both inspection intervals and methods to inspect for leakage and corrosion or wear.
5. **Abandonment of Out-of-Service Requirements.** 30 C.F.R. § 250.156.

G. Contents of Application for Right-of-Way for or Installation of a Lease Term Pipeline. 30 C.F.R. § 250.157

1. General Requirements for all applications for a pipeline right-of-way grant. 30 C.F.R. § 250.160.

Applications are submitted in quadruplicate to the Regional Supervisor.

2. Specific Requirement for lease-term pipeline or right-of-way grant. 30 C.F.R. § 250.157.

- a. Plats drawn to scale showing major features, area, depth, route, length, and other pertinent data. 30 C.F.R. § 250.157(a)(1).

- b. A schematic drawing showing the specifications for the pipeline, risers, and pressure regulating devices. 30 C.F.R. § 250.157(a)(2).

- c. General technical information as follows:

- i. Cathodic protection system and anodes.

- ii. Pipeline coating.

- iii. Internal protective measures.

- iv. MSP and MAOP.

- v. Hydrostatic test pressure.

- vi. Proposed dates for commencing and completing installation.

- vii. Other similar data. 30 C.F.R. § 250.157(a)(3).

- d. Shallow hazards survey, or with approval of Regional Supervisor, a shallow hazards analysis, for entire length of pipeline. *See*, NTL 83-3, Shallow Hazards Requirements for the Gulf of Mexico, OCS Region, dated September 7, 1983.

- e. Archaeological resource report, if applicable.

- f. Applications to modify an approved lease-term pipeline or grant must only address the items in the original proposal that are proposed for modification.
- g. Applications to abandon or relinquish an approved lease-term pipeline or grant must include the following:
 - i. Reason for operation.
 - ii. Proposed procedures.
 - iii. "As-built" location plat.
 - iv. Length of segment to be abandoned or relinquished.
 - v. Length of remaining segment. 30 C.F.R. § 250.157(c).

H. Approval of Application: 30 C.F.R. § 250.161

- 1. General - The MMS will consider potential effect of construction and operation of the pipeline on the environment, aquatic life, property and mineral resources. The MMS may request input of third parties, including federal and state agencies. The MMS may also attach stipulations to protect safety and the environment to the grant of the right-of-way.
- 2. Special - Rights-of-way which cross areas withdrawn from disposal or restricted from oil and gas activities - need consent of federal agency in charge of area.
- 3. Special - Owners of rights-of-way which cross state submerged lands must submit to the MMS evidence that state reviewed the application and any comments state made on application.
- 4. Special - CZMA - State consistency approval is needed if grant of right-of-way affects "any land or water use in the coastal zone" of that state.

I. General Reporting Requirements - All Pipelines: 30 C.F.R. § 250.158.

- 1. The Lessee or right-of-way holder must make the following reports at the noted intervals to the Regional Supervisor.

2. The Lessee or right-of-way holder must notify the Regional Supervisor 48 hours prior to commencing any installation, pressure testing, or relocation of a pipeline. 30 C.F.R. § 250.158(a).
3. "As Built" Plat. Within 90 days after completion of any construction, the Lessee or right-of-way holder must submit a report, along with a certified "as built" location plat showing location, length, proposed date of operation, etc. 30 C.F.R. § 250.158(b).
4. Pipelines Taken Out of Service: Report such to the Regional Supervisor, including written confirmation if the out of service period (i.e., no flow) is greater than 60 days. 30 C.F.R. § 250.158(c).
5. Pipeline Safety Equipment Taken Out of Service: Report any such equipment out of service for more than 12 hours *and* report when the equipment is placed back in service. 30 C.F.R. § 250.158(d).
6. Pipeline Repair Operations: Notify the Regional Supervisor prior to repair or as soon as is practicable. A detailed post-repair report is required. *See*, 30 C.F.R. § 250.158(e).
7. Pipe-to-Electrolyte Potential Measurements: Lessees must report such tests annually before March. 30 C.F.R. § 250.158(e).
8. Corrective Action for Environmental Reasons: If the Regional Supervisor notes that scouring, soft bottoms, or other environmental factors are "detrimentally affecting a pipeline, he may require corrective action by the Lessee or right-of-way holder as well as a subsequent report. 30 C.F.R. § 250.158(g).

**J. General Requirements for Grants of Right-of-Way Pipelines:
30 C.F.R. § 250.159**

1. A person may not install a ROW pipeline until he has requested and obtained a right-of-way grant pursuant to Subpart J. 30 C.F.R. §§ 250.159(a)(1) and 250.150(d). (The two provisions are redundant and one should be eliminated.)
2. Subpart J also requires a person to comply with "applicable requirements of 30 C.F.R. § 250.150 through 30 C.F.R. §

250.158," as well as applicable DOT, Army, and FERC regulations. *Id.* Which of the requirements for the DOI pipelines contained in 30 C.F.R. §§ 250.150-158 need be satisfied by an applicant for a right-of-way for a ROW pipeline? Unfortunately, the MMS did not clarify either in its regulations or the preamble thereto, which requirements apply.

The safest approach may be to comply with the information, design, construction, maintenance, and reporting requirements contained in 30 C.F.R. §§ 250.150-158, unless specifically contradicted by any of the ROW pipeline regulations appearing at 30 C.F.R. §§ 250.159-250.164, as listed below.

3. **Citizenship.** Rights-of-way may only be acquired and held by United States Nationals, aliens with permanent resident status, 8 U.S.C. § 1101(a)(20), associations of the above classes of individuals, or corporations organized under either federal or state law.

Note: foreign nationals may therefore only acquire and hold rights-of-way through a domestic corporation. Also, partnerships are included within the definition of "association." *See*, 30 C.F.R. § 256.35; *see also*, 48 Fed. Reg. 37,656 (August 19, 1983) (relating to the BLM's similar requirement contained in 43 C.F.R. Subpart 3102).

4. **Width.** The right-of-way shall not exceed 200 feet in width, "unless safety and environmental factors" justify a greater width. One may assume that the MMS meant only to require the presence of one of the two above problems, and not both factors before approving a wider than usual right-of-way.
5. **Annual Rentals.** The holder must pay \$15/statute mile plus \$75/accessory site. Payments may be made on an annual basis or in 5-year multiples. 30 C.F.R. § 250.159(c).
6. **"Subject To" Clause.** All right-of-way grants or use thereof are subject to the ambiguous proviso that the grant or use of the grant "shall not prevent or interfere in any way with the management, administration or the granting of other rights by the United States, either prior or subsequent to granting of the right-of-way." 30 C.F.R. § 250.159(c)(3). If taken literally ("shall not prevent or interfere in *any* way"), this proviso may reduce a grant to a meaningless right. What if the Department of Defense wishes to establish a practice bombing range over

your right-of-way? As currently written, the proviso means that the right-of-way holder loses.

Perhaps the MMS should rewrite this regulation to prohibit only unreasonable interference, and not "any interference." Also, "unreasonable interference" should be limited to unreasonable interference with subsequent United States grants of rights in the area. Theoretically, the United States is aware of prior United States grants of rights in or around the applicant's course for the proposed right-of-way. Any necessary restrictions based on the presence of current rights holders should be written into the original terms of the right-of-way grant itself.

7. **Hold Harmless and Indemnity.** The right-of-way holder must hold the United States, its Lessees or other right-of-way holders harmless from property damage caused by its use of the right-of-way. Additionally, the right-of-way holder must indemnify the U.S. from any personal injury, death, or property damage caused by such use. 30 C.F.R. § 250.159(c)(6).
8. **Inspection and Record Retention.** The right-of-way itself and *all* relevant records must be kept available for reasonable inspection by the MMS. No time length for maintenance of records is given. However, under 28 U.S.C. § 2415(a) the United States generally must institute an action for money damages based upon a contract within six years after the cause of action accrues. A right-of-way grant may be viewed as a contract between the MMS and the permittee and Lessee. So six years appears to be a good rule of thumb for minimum record retention requirements. *Phillips Petroleum Co. v. Lujan*, No. 88-C-1487-E (N.D. Okla 1989).

Note, however, that the MMS under 30 U.S.C. § 1713(b) of the Federal Oil and Gas Royalty Management Act pursuant to an audit or investigation may ask a Lessee or permit holder to retain records for an even longer period of time. 30 U.S.C. §§ 1701-1757.

K. Applications for a ROW Pipeline Right-of-Way: 30 C.F.R. § 250.160

Applications for right-of-way should be submitted in triplicate to MMS Regional Supervisor, stating the primary purpose of right-of-way and addressing requirements contained in 30 C.F.R. § 250.157(a).

1. Include a \$1,400 filing fee and relevant rentals computed pursuant to 30 C.F.R. § 250.159(c).
2. Include a statement of citizenship for individual applicants, certified articles of association for a partnership, and certified statement showing state of incorporation and list of persons authorized to act on behalf of the corporation for a corporation. 30 C.F.R. § 250.160(b).
3. Include a list of Lessees and rights-of-way holders whose property is crossed by the proposed right-of-way, and a statement that a copy of the application has been sent by certified mail to each of these parties.
4. A Non-Discrimination in Employment Form YN 3341-1, July, 1982.

L. The Right-of-Way Granting Process: 30 C.F.R. § 250.161

1. The MMS processes an application for a ROW pipeline grant similar to the OCS lease sale process, but on a much smaller scale and in a more casual fashion.
2. The Regional Supervisor (RS) prepares an environmental analysis.
3. The RS may hold public meetings, consult with other federal and state or intergovernmental planning agencies over the application.
4. If the proposed route crosses state submerged lands, the applicant must submit evidence that the state has reviewed the application (this would consist of a CZMA consistency determination for states that have approved Coastal Management Programs pursuant to the CZMA 16 U.S.C. §§ 1451-1464).
5. The applicant must submit proof that each Lessee or Right-of-Way holder whose grant is crossed by the proposed Right-of-Way route has received a copy of the application. Each of those parties has 30 days to submit comments on the proposed Right-of-Way. 30 C.F.R. §§ 250.161(c)(1) and (2).
6. Surface Agency Consent. The applicant must submit evidence of Surface Agency consent if the proposed Right-of-Way

crosses a restricted area such as a shipping fairway or military exercise zone.

7. The RS will also consider the application pursuant to the general standard contained in § 5(a) of the OCSLA. That is, either during the construction or operational phase, what is the potential effect of the pipeline associated with the proposed Right-of-Way grant "on the human, marine, and coastal environments, life (including aquatic life), property, and mineral resources in the entire area." 30 C.F.R. § 250.161(a).
8. The RS may add stipulations to the grant in order to protect any of the above concerns. Additionally, the RS may request that the applicant amend the application. The applicant does not need to deliver a copy of the amended application to relevant Lessees and Right-of-Way holders, unless the RS determines that to be necessary. (Query: How does the RS determination coincide with state agency application review authority under the CZMA?). 30 C.F.R. §§ 250.161(e)(1) and (2).
9. Rejection. "A decision to reject an application shall be in writing and shall state the reasons for the rejection." *Id.* at (e)(3).
10. Pre-Construction Change of Conditions. The RS may require modification of an already-approved Right-of-Way grant if a "significant change in conditions" occurs subsequent to the Right-of-Way grant but prior to actual construction. 30 C.F.R. § 250.162(c).

M. Bonding: 30 C.F.R. § 250.159(b)(1)

1. Operator currently must post a \$300,000 surety bond for the relevant OCS region prior to issuance of any grant or grants in that region. Note, that under NTL 89-07 in the Gulf of Mexico, the MMS may require additional financial security if it deems an "operator" to be a financial risk. The term operator in NTL 89-07 appears to include pipeline rights-of-way and not just OCS leases, but the issue is unclear.
2. Note: After a "default" (i.e., failure to comply with the terms of the relevant grant), a new \$300,000 bond must be posted within six months (apparently of the "default," but the MMS does not specifically tie the six-month time frame thereto).

Theoretically failure to comply with the requirement could result in forfeiture of *all* grants covered by the bond although this seems an unlikely result.

N. Reporting Requirements: 49 C.F.R. Part 191 and 49 C.F.R. Subpart 195.50

Both operators of gas and hazardous liquids pipelines, including OCS pipelines, are required to report to the Office of Pipeline Safety (OPS) whenever accidents occur or certain safety-related conditions exist. *Id.*

1. Gas Pipeline - "Reportable Incident": requires a release of natural gas and either; (a) Death or personal injury requiring hospitalization; (b) property damage estimated in excess of \$50,000; or (c) any other event which in the opinion of the operator is significant. 49 C.F.R. § 191.3(1).
2. Gas or Hazardous Liquids Pipelines - "Safety-related Conditions." A pipeline operator must also report various potentially dangerous pipeline conditions to the OPS. Those include *inter alia* cracks, defects, malfunctions, leakage, abnormal loads on or movement of a pipeline within five working days that the condition is determined to exist, but in any event, no later than ten days after initial discovery. 49 C.F.R. §§ 191.123, 195.55 and 56.
3. Hazardous Liquids Pipeline - "Reportable Incident": An operator must report any failure in a pipeline system where there has been a release of hazardous liquids which results in either: (a) an explosion or fire; (b) loss of 50 or more barrels of liquid; (c) escape of more than five barrels/day of volatile fluids which may form a vapor cloud; (d) serious bodily harm to or death of any individual; or (e) property damage in excess of \$5,000. 49 C.F.R. § 195.50. Thus hazardous liquids pipelines are subject to more rigorous accident reporting requirements than gas pipelines.

Report by telephone any of the above, or any pollution of any water body "at the earliest practicable time." 49 C.F.R. § 195.52.

O. Construction: 30 C.F.R. §§ 250.162(b), 256.95 and 49 C.F.R. Parts 192 and 195

1. Term. The Right-of-Way holder must begin construction of pipeline within five years from date of the grant or else the right-of-way is deemed abandoned. 30 C.F.R. § 256.95.
2. Deviations from Proposed Route. 30 C.F.R. § 250.162(b).
 - a. Right-of-Way holder must minimize deviations from the approved route.
 - b. Right-of-Way holders must notify all relevant Lessees and Right-of-Way holders that a deviation occurred. Must also indicate to the RS within 60 days of the RS' acceptance of completion of pipeline construction report that such notification was sent.
 - c. Right-of-Way holder must relinquish unused portion of Right-of-Way.
 - d. "Substantial deviation" is grounds for forfeiture of the Right-of-Way grant. The term "substantial deviation" is not defined, but most likely the term depends upon the objection on safety or environmental grounds of an adjacent Lessee or Right-of-Way holder, since they are likely the only parties to be aware of the deviation other than the MMS.
3. Pipeline Design, Construction, and Operation Requirements. The Right-of-Way holder must comply with the DOT design, construction, and operation regulations contained in 49 C.F.R.: "Pipeline Safety, Part 192 - Transportation of Natural and Other Gas by Pipeline: Minimum Federal Safety Standards; and promulgated pursuant to either the Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671 (Supp. III 1982), or the Hazardous Liquids Pipeline Safety Act, 49 U.S.C. § 2001 (Supp. III 1982).
4. Summary. The Natural Gas Pipeline Safety Act (NGPSA) and the Hazardous Liquids Pipeline Safety Act (HLPESA) regulate the transportation by pipeline of "gas" or "hazardous liquids". "Gas" is defined to include "natural gas". 49 C.F.R. § 192.3. "Hazardous Liquids" are defined by statute to include "petroleum or any petroleum product." 49 U.S.C. § 2001(2)

(Supp. III 1982). The Office of Pipeline Safety within the Research and Special Programs Administration of DOT issues and enforces regulations relating to pipeline transportation of natural gas and hazardous liquids.

One should also mention the role of the NTSB. The NTSB was established as an independent agency in 1975. 49 U.S.C. § 1902 (Supp. III 1982). The Board possesses broad investigatory authority over *inter alia* marine and pipeline accidents and is directed to recommend regulatory amendments to the DOT. Unlike most other agencies however the NTSB has no enforcement authority, and the NTSB investigatory findings are not admissible evidence in any private litigation arising from a disaster. 49 U.S.C. § 1903(c) (Supp. III 1982). *Cf.* the holding of *Rainey v. Beech Aircraft Corporation* at Article XVIII.C.2(4) *infra*.

5. Applicability. The DOT design, operation, and maintenance requirements are applicable to all pipeline facilities that transport gas or liquids within the limits of the OCS, except for gathering lines "upstream of the outlet flange of each facility on the outer continental shelf where hydrocarbons are produced or where produced hydrocarbons are first separated, dehydrated, or otherwise processed, whichever facility is farther downstream." 49 C.F.R. § 192.1(a) and 49 C.F.R. § 195.1(a)(5).

6. Specific DOT/OPS Pipeline Requirements.

The applicable DOT/OPS requirements for gas pipelines appear as follows:

- a. Materials. Selection and qualification of pipe and other components. 49 C.F.R. § 192.51
- b. Pipe Design. Sets standards for pipeline wall thickness or other protection necessary to withstand external loads. 49 C.F.R. § 192.101
- c. Design of Pipeline Components. Includes valves, flanges, fittings, and tappings. 49 C.F.R. § 192.141
- d. Welding. Includes welder qualifications, as well as welding procedures. 49 C.F.R. § 192.221

- e. Joining Other Than by Welding. Involves cast iron, copper, and plastic pipe. 49 C.F.R. § 192.271
 - f. General Construction Requirements for Transmission Lines and Mains. 49 C.F.R. § 192.301
 - g. Meters and Service Lines. 49 C.F.R. § 192.351
 - h. Corrosion Control and Cathodic Protection. Establishes minimum requirements for external, internal, and atmospheric corrosion. 49 C.F.R. § 192.451
 - i. Testing. Leak test and strength test standards for pipelines. 49 C.F.R. § 192.501
 - j. Upgrading. Rules applicable to increasing the maximum allowable operating pressure on existing pipelines. 49 C.F.R. § 192.551
 - k. Operations. Note that each operator must establish written procedures to deal with a gas pipeline emergency. 49 C.F.R. § 192.601
 - l. Maintenance. 49 C.F.R. § 192.701
7. For oil or condensate pipelines, the Right-of-Way holder must comply with similar DOT Requirements for "Transportation of Hazardous Liquids by Pipeline". 49 C.F.R. Part 195. Two of the requirements are of note.
- a. Valves. 49 C.F.R. §§ 195.258-260. Valves must be located on main lines so as to minimize the damage from accidental release of hazardous liquids.
 - b. Maintenance and Inspections. Subpart F, 49 C.F.R. § 195.400 establishes requirements for personnel training, pipeline inspection, and corrosion control. Note, however, that the inspection requirements currently are not applicable to offshore pipelines. 49 C.F.R. § 195.412(b).
8. Pipeline Burial. Note, that the NTSB in a letter dated February 24, 1990, recommended that the DOI and the gulf states give "urgent" priority in assisting the DOT to identify all offshore pipelines in the Gulf of Mexico. The NTSB also

requested that the DOI help the DOT to find ways to inspect those pipelines and to ensure that the lines are buried, or if already buried do not become exposed due to wave or current action. The agency cited 21 reported accidents since 1985 in which marine vessels damaged offshore pipelines. The costs to inspect and to maintain the estimated 18,000 miles of pipelines in the Gulf of Mexico could become a significant portion of the cost to maintain offshore pipelines.

P. Operations - Right-of-Way Pipelines: 30 C.F.R. § 250.159 and 49 C.F.R. Subparts 192.601 and 195.400

1. Must comply with the DOT operations and maintenance requirements contained in 49 C.F.R. Subchapter D, Parts 192 and 195 - "Transportation of Natural and Other Gas by Pipeline - Maintenance" and "Transportation of Hazardous Liquids by Pipeline - Operation and Maintenance."
2. Must comply with the current MMS regulations, and also future MMS regulations which provide for "prevention of waste, the conservation of the natural resources of the OCS and the protection of correlative rights therein." 30 C.F.R. § 250.159(a)(i).
3. Must use economically feasible, best available and safest technologies for pipeline burial. *Id.*
4. Paradoxically, the MMS requires rights-of-way not interfere with any prior *or* subsequent right granted by the United States. 30 C.F.R. § 250.159(a)(4).
5. Must remove any improvement that would impede either fishing or navigation within one year of abandonment of the right-of-way. Structures not removed become property of the United States. 30 C.F.R. § 250.159(a)(6).
6. Must maintain pipeline so as not to pose an unreasonable obstruction to fishing and shipping. 30 C.F.R. § 250.159(a)(8).
7. Temporary cessation for repairs or suspension will not terminate the right-of-way grant. 30 C.F.R. § 250.159(c).

Q. State Pipeline Regulatory Programs

Summary. Note that in the Gulf of Mexico region, the states of Louisiana and Texas have enacted legislation which parallels the above federal regulatory program. La. Rev. Stat. 32: 1501, and associated Department of Natural Resources, Office of Conservation regulations; Tex. Rev. Civ. Stats. Ann. 6053-1; 16 TAC 7.70-72; and Tex Nat. Res. Code 117.011-101.

R. Non-Discriminatory Access: 30 C.F.R. § 250.159(c)(7) and F.E.R.C. Order No. 509, 509-A

1. The OCSLA Amendments of 1978 imposes common carrier obligations on all pipelines crossing the OCS except as noted below. 43 U.S.C. § 1334(f)(1)(A).
2. The holder of a Right-of-Way oil or gas pipeline must purchase oil or gas produced in the vicinity of the pipeline without discrimination from both owner and non-owner shippers.
3. The FERC Orders Nos. 509 and 509-A established the procedural context for this rule. 53 Fed. Reg. 50,925 (December 19, 1988); 54 Fed. Reg. 8301 (February 17, 1989). Basically, the Orders extended to every interstate gas pipeline which under a certificate issued under section 7 of the Natural Gas Act transports gas on or across the OCS, a blanket certificate which both authorizes and requires nondiscriminatory transportation of natural gas for third parties. 18 C.F.R. § 284.302(b). The Orders also required each OCS pipeline to file tariffs to implement that authorization. Pipelines are authorized to maintain current transportation rates in effect until each pipeline has had the opportunity to present its position for a new rate schedule.

Both firm and interruptible transportation service must be provided. Order 509-A added a provision which addressed the priority of existing requests for firm service during and after the annual open season for firm transportation. 18 C.F.R. § 284.304(a)(4).

The FERC left open for decision on a case-by-case basis whether capacity can or must be allocated on a prorata basis. 54 Fed. Reg. 8301, 8303 (February 28, 1989).

4. For any OCS pipeline built after passage of the 1978 Amendments and upon the request of a shipper, the FERC may also order an expansion of throughput capacity of a pipeline 1334(f)(1)(B). Note, however, that post-1978 pipelines in the Gulf of Mexico and Santa Barbara Channel are exempted.
5. The FERC may exempt a pipeline from the common carrier obligations listed above if the pipeline is a gathering line or a pipeline to *e.g.*, a dehydration or processing plant, or other similar facility. 43 U.S.C. § 1334(f)(2).

S. Non-Price Marketing Restrictions on Sales of OCS Gas

1. Congress finally repealed § 315 of the NGPA. That section contained the much maligned and usually ignored 15-year or life of reservoir restrictions on the duration of contracts for new or high cost OCS gas as well as the original purchaser's right of first refusal on §§ 102(c), 103(c) and 107(c)(1-4) OCS gas covered by an expired or terminated contract. P.L. 100-439, 102 Stat. 1720 (September 22, 1988).
2. Concomitantly, the FERC repealed 18 C.F.R. Part 277 of its regulations in its entirety, as those regulations implemented former § 315 of the NGPA. 54 Fed. Reg. 8529 (March 1, 1989).

T. Assignment of a Right-of-Way Grant: 30 C.F.R. § 250.163

1. May assign all or a lineal segment of a right-of-way grant.
2. Transferee must satisfy qualifications of a new applicant for a right-of-way grant under 30 C.F.R. § 250.160 and also agree to comply with the terms of the extant grant.

U. Relinquishment, Forfeiture, or Cancellation of Right-of-Way Grant: 30 C.F.R. §§ 250.159(c)(9) and 250.164

1. Holder must remove all structures within one year of date of termination of grant unless RS waives the requirement in writing.
2. Holder may relinquish all or a portion of a grant.

XVII. Lease-Line Wells, Pooling, Joint Plans of Production, and Unitization

A. Introduction

Common development of an offshore reservoir by multiple Lessees presents a fascinating array of issues and permutation of possible resolutions. The federal government's versions of pooling and unitization are of course available solutions. However, there are a number of other private cooperative methods of development that should be considered prior to involving the MMS. Unlike most state unitization hearings in the onshore arena, the lessor and the adjudicating party are one and the same party; the MMS. The identity of interest between the lessor and the adjudicator, as well as certain statutory language such as the Offshore Oil Spill Compensation Fund which is only in effect on the OCS, requires any Lessee considering or facing common development of an OCS reservoir to tread lightly prior to entering into any joint development scheme. Those relevant factors are discussed below.

B. Joint Operating Agreement

The most obvious solution to development of a reservoir that underlies two or more OCS leases with different ownership interests is by direct agreement between the Lessees- i.e., a joint operating agreement (JOA). By contract, the parties may designate which reservoirs and what quantities of production from those reservoirs will be allocated to which Lessees. Chevron Corporation's Eugene Island Block 361 Field Agreement is an example of application of such a scheme to multiple leases and reservoirs. The most common usage of JOA's, however, involves reservoirs which will not support competitive development by the varying Lessees-i.e., there are insufficient reserves to support the costs of drilling more than one well.

Use of a properly drafted JOA has the advantage of not involving the MMS since no type of property interest in either block needs to be assigned. *See*, 30 C.F.R. § 256.62; the MMS must approve transfer of any interest in an OCS lease.

The MMS, of course, may at any time independently force OCS Lessees into a competitive reservoir determination or a unitization hearing in contravention to the allocation scheme contained in the underlying JOA. 30 C.F.R. §§ 250.190(a) and 191(a). However, independent MMS intervention is rare. Also, the MMS would not disturb any allocation of production which occurred prior to the date

of the order requiring a Joint Plan of Production or unitization as noted below.

In addition to the traditional joint development issues which arise when multiple leases are managed pursuant to a single JOA, the parties should consider certain issues unique to OCS leases.

1. **No Cross Assignment of Interests in Lease Blocks.** As noted above, the MMS must approve assignment of any interest in an OCS lease to an entity which is not a record title holder of the lease, including subsidiaries of the current leaseholder. 30 C.F.R. § 256.62. Under the state law of a number of states which are adjacent to the OCS, parties which enter into a JOA may automatically cross assign interests in leases subjected to the agreement simply by signing the JOA. (Under 43 U.S.C. § 1333(a)(2)(A) of the OCSLA, as amended, the laws of adjacent states are applicable to the OCS to the extent that they are not inconsistent with relevant federal law and regulation. To the best of my knowledge, the MMS has promulgated no rules relating to the issue of cross assignment.) The author suggests that the JOA contain a simple statement that no cross assignment of interests is intended, if the parties do not wish to seek MMS approval for or notification of the agreement.

In addition, Lessees are subject to greater vicarious liability in developing OCS leases as noted in subsection 4 below. For that reason, a Lessee may not wish to own a proportionate interest in every OCS lease subject to the JOA.

2. **Lease Maintenance, Loss of and Addition of Leases to the Agreement.** Section 3 of OCS Lease Form MMS-2005 (March 1986) (Form) states in part as follows: "This lease shall continue from the Effective Date of the lease for the Initial Period and so long thereafter as oil or gas is produced from the leased area in paying quantities"

Section 2 of the Lease Form defines the "leased area" as the acreage covered by the specific lease description.

Contractually, the Lessees may allocate production to any lease or well in any fashion that they wish and the MMS will not interfere with that allocation. However, the MMS for its own regulatory purposes will only recognize production to come from those leases where the actual wellheads are located. That

is, contractual reallocation of production under a JOA will not and cannot serve to perpetuate an OCS lease unless production actually emanates in paying quantities from a well or well located on the "leased area."

Additionally, the MMS does not allow parties to "top lease" OCS leases in order to protect their lease interest. (Query: Might top leasing simultaneously constitute both a method to contribute to the lessening of the federal deficit and also a way to force current OCS Lessees to develop their current OCS leases more diligently?)

Thus, two issues need to be addressed by the parties in the JOA. First, and obviously is whether loss of any particular lease will affect the allocation of production under the terms of the JOA. Second, whether the parties should attempt to rebid and recover the lost lease at the next available OCS Lease Sale and what the ownership percentages in the recovered lease should be.

Finally, the parties should include a mechanism to allocate production if a reservoir underlying an additional lease is subjected to the JOA.

3. **Payment of Royalties.** Section 6 of the current OCS Lease Form requires a Lessee "to pay a fixed royalty . . . in amount or value of production saved, removed, or sold from the leased area." Former state leases validated under Section 8 of the OCSLA may contain varying royalty clauses. However, these leases still require payment of royalties on a lease basis. Similar to Section 3 *supra*, the JOA between the Lessees cannot alter the method in which the MMS assesses and collects its royalties on production. This is important because the royalty obligation on the various OCS leases subject to the allocation scheme under the JOA may differ.

However, all production through a particular wellhead will be subject to the royalty rate for the OCS lease upon which the wellhead is located. The allocation formula should account for the possibility that under the JOA, allocation of production and payment of royalties may not coincide with the royalty provisions of the underlying leases and equalize such payments.

This anomaly may work for or against the position of a particular OCS Lessee when royalty burdens vary. So it is best to draft a fair solution to the problem.

The MMS is aware that adjacent OCS Lessees may develop a common reservoir and place wellheads on leases with the lowest royalty burden so as to avoid producing through a lease with a higher royalty burden. That is the reason why 30 C.F.R. § 250.171(b) requires notification of the MMS whenever Lessees of leases with varying royalty burdens plan a well within 500 feet of the common leaseline and why the MMS often itself requires unitization of adjacent OCS leases which overlie a common reservoir but which have differing royalty burdens.

4. **Operatorship and Rates of Production.** These are two interrelated issues which raise unrelated concerns. First, the parties need to consider whether contractually to regulate rates of production between wellheads. This is important because the operator may have the incentive to produce wells located on leases in which its working interest is the greatest, so that it receives a proportionately larger share of production.

Second, the parties must also choose their operator carefully because federal law imposes generally broader liability upon record title holders of OCS leases than does state law in the onshore arena. Under state law generally, one is not liable for the actions of an independent contractor or third party with an interest in the lease. In contrast, the MMS specifically imposes the duty to perform safe and workmanlike operations upon the Lessee. 30 C.F.R. § 250.20; Section 12 of the OCS Lease Form MMS-2005 (March 1986). Similar vicarious liability rules for oil spills exist. The Offshore Oil Spill Compensation Fund statutorily imposes joint and several liability for pollution both upon the owners and operators of offshore oil facilities. 43 U.S.C. § 1814.

The Fund, as previously noted, merely supplements Section 311 of the CWA. 33 U.S.C. § 1321. The relevant U.S. Coast Guard regulations which implement the CWA's requirements for removal of discharged oil, 33 C.F.R. Subpart 153, also state that "[t]he provisions of this subpart apply to any owner or operator of a vessel or onshore or offshore facility from which a discharge of oil into coastal waters occurs" 33 C.F.R. §§ 153.303 and 153.405. "Coastal waters" is defined to include waters over the OCS. 33 C.F.R. § 153.103(e).

As noted, the OCS Lessee has contractually committed itself to maintain its offshore facilities "free from recognized hazards to employees of the Lessee *or* of any contractor or subcontractor operating within the lease area." Section 12 of the OCS Lease Form. It is unclear whether language can be drafted to avoid that obligation or to delegate that duty. The only solution may be insurance and a hold harmless provision in the agreement with the farmouttee, co-venturer or contract operator. Finally, note that there is a similar indemnification clause in Section 14 of the OCS Lease Form which attempts to insulate the MMS from liability for consequences from any of its decisions or orders.

Also, the MMS regulations require the Lessee to designate an operator of record. 30 C.F.R. § 250.8. The operator is given by regulation the authority to act on behalf of and fulfill the underlying Lessees' obligations. For further discussion of vicarious liability issues, *see* Article XIV.B *supra* which discusses vicarious liability surrounding platform removal requirements.

5. Insurance and Indemnity. The parties need to address the issue of whether only production will be allocated between the blocks or whether various losses which arise will be handled in a similar fashion. As noted above, the Lessees are exposed to greater vicarious liability on the OCS than under traditional independent contractor doctrine. The issue is especially important if any of the blocks have been obtained by farmout, since the OCS Lessee invariably remains the owner of record. The usual boilerplate language disclaiming on behalf of the record Lessees any liabilities which arise while the farmouttee utilizes the OCS lease, may not survive the broad duties imposed upon record title holders by federal law as noted above. Thus, the Lessees should consider requiring the farmouttee or operator to maintain insurance coverages, including well control insurance, and also be named an additional insured on the policies, in order to mitigate any vicarious liability claims.
6. Gas Balancing. The parties should also consider how to handle the inevitable situation where one party cannot or does not desire to take the entire share of allocated gas production to which it is entitled. Split stream deliveries are uncommon on the OCS, usually because of development cost reasons alone. Thus, production usually flows into a single pipeline at

a relatively consistent rate of production, regardless of short-term fluctuations in takes by the Lessees.

7. **Withdrawal Provisions.** Smaller capitalized Lessees should consider seeking the right unilaterally with notice to withdraw from any joint development scheme. For example, the revised 1988 regulations now *require* a Lessee(s) to engage in secondary and tertiary recovery operations where economically and technologically feasible. 30 C.F.R. § 250.177(a). See also, 30 C.F.R. § 250.110 which requires a Lessee to demonstrate that a well has no more productive capacity before the MMS will approve abandonment of that well. Thus, a Lessee may find itself unwillingly locked into participating in such an expensive project which drains significant amounts of its capital and produces a rate of return which is not acceptable.
8. **Rates of Production From Leases Included, Excluded from the Agreement.** The reasons for regulating rates of production for wells on leases included within the joint development area were discussed in subsection 4 above. However, one must also be careful to review rates of production from leases excluded from the joint development too.

For example, an adjacent Lessee seeks a farmout of the southern half of your lease. The Lessee drills a well on your lease, thereby successfully earning an interest in your lease. Then the Lessee proceeds to plug that earning well and goes back to a well on his original lease and produces the reservoir, draining your lease reserves too. A simple clause in the farmout regulating production on the two unrelated lease blocks can prevent this situation from occurring.

C. Pooling and Drilling Agreements

Pooling and Drilling Agreements are permissible between adjoining offshore blocks, although direct reference to such agreements has been abolished in the 1988 revised regulations. (Former 30 C.F.R. § 250.52) 30 C.F.R. § 250.32.

1. This is one way of avoiding the 500-foot lease-line line offset requirement contained in 30 C.F.R. § 250.171(b).
2. **Offset Notification Requirement.** Note, however, the subtle 1988 revision of the 500 foot offset requirement in its incorporation into the regulations from former OCS Order 11.

OCS Order 11 required approval of offset operators before such a well could be drilled or produced. Now, under 30 C.F.R. § 250.171(b) the MMS may approve *producing* the well over the objections of the offset operator. *See*, 53 Fed. Reg. 10,688 (April 1, 1988). Query: does the operation of an injection well constitute "production"? Or may an operator place and operate an injection well without MMS approval within 500 feet of a lease line since no "production" will occur in a traditional sense? [See also, the definition of "production" in the OCSLA. 43 U.S.C. § 1333(m)]. *See*, 53 Fed. Reg. 10,668 (April 1, 1988).

Note also, that the interest of the operator is not necessarily synonymous with the interest of the underlying Lessee(s). The best example of that situation is when the Lessee has farmed out an interest in its block to a third party, and the third party is designated operator of the lease block. One might consider including language in the underlying farmout that the operator will object on behalf of the Lessees to the MMS to producing any well within 500 feet of the lease boundary when the Lessee(s) so requests.

3. The Director must approve a Pooling or Drilling Agreement and the Agreement must be submitted in conjunction with an approved Plan of Development and Production. 30 C.F.R. §§ 250.30 and 250.32(a).
4. Effect of Agreement. There is some confusion as to the effect of Pooling and Drilling Agreements. The terms of a Pooling or Drilling Agreement approved by the Director pursuant to 30 C.F.R. § 250.32 ostensibly control over inconsistent terms contained in at least the latest form OCS lease. Form MMS-2005 § 16 (March 1986). This appears to be a subtle method of revising undesirable OCS lease terms or at least terms not related to actual drilling, producing or well-reworking obligations.
5. Neither Pooling nor Drilling Agreements themselves will maintain an underlying lease.

D. Farmouts and Assignments of Operating Rights

Do not forget to consider exchanging operating rights at various depths in adjacent blocks as an alternative to Pooling, Joint Plans of Production, and Unitization. This method is effective if the parties'

respective target depths differ. Note once again, that any well drilled upon the assigned rights will only maintain the lease upon which the well is located. One may also seek a farmout of the relevant competitive acreage or farmout one's own OCS lease. See Professor Lowe's article entitled *The Anatomy and Preparation of OCS Farmout Agreements* from the 1989 Rocky Mountain and Eastern Mineral Law Foundations Seminar entitled "Oil and Gas Operations in Federal and Coastal Waters" for a good discussion of issues surrounding OCS farmouts. Of course, any farmout or assignment of operating rights is not effective until approved by the MMS. 30 C.F.R. § 256.62.

E. Objections to POEs and DPPs: 30 C.F.R. § 250.32(b)

1. Government Intervention. The remaining methods of common development of offshore reservoirs discussed in this Section require some sort of action by the MMS in order to be implemented. The revised regulations suggest a novel and untried method for attempting to thwart unilateral deleterious development on an offset lease. That is, offset Lessees may object on a systemic level to proposed well locations in proposed POEs and DPPs. To exercise such rights, you must monitor the MMS publication of Notices of Proposed Plans in the Federal Register. Realistically, a Lessee probably needs a producing or producible well on its lease in order to have standing to object. It is an unwritten rule that the MMS will generally not interfere with exploration or development on an adjacent lease unless the party requesting the relief has conducted some activities on its own lease.
2. Note: An operator on behalf of a Lessee may always in any case object to production from a completion or well location which is proposed within 500 feet of its lease line. 30 C.F.R. § 250.171(b). Note, however, that the interests of the Lessee and the operator may not always be synonymous. For example, under a typical farmout, the farmouttee may be the operator on the lease instead of the Lessee of record.

F. Competitive Reservoir Determinations and Joint Plans of Production

1. The Director may require Lessees whose leases overlay a "competitive reservoir" to conduct development and production operations pursuant either to a voluntary Joint Development and Production Plan or a unitization agreement. 30 C.F.R. § 250.191.

[Note: This is a good example of the MMS imposing operating requirements other than by statute or regulation.]

Initiation of Process. Unlike a request for unitization, theoretically only an operator of a block may request a competitive reservoir determination. See, 30 C.F.R. § 250.2 for the definition of a "Lessee." However, since fairness is the underlying rationale of a competitive reservoir determination, it is unlikely that the MMS will refuse to consider a request from a nonoperating working interest owner in an affected block. Nonetheless, beware of such a possibility.

2. The MMS Response. The Director shall notify the lease operators by letter when he has made a preliminarily determined that a reservoir is "competitive." 30 C.F.R. § 250.191(b). While the determination is often a first step toward unitization of a reservoir, Section 250.191(c) does not require unitization in order to produce a competitive reservoir. Also, for the RS to find a reservoir to be "competitive" does not require a finding that the same reservoir is reasonably delineated. Thus, unlike unitization, a competitive reservoir determination does not need to include every lease onto which the reservoir may extend.
 - a. The lease operators may challenge the Director's determination within 30 days of notice of the Director's decision.
 - b. 30 C.F.R. § 250.2 defines a "competitive reservoir" as follows:
 - i. Competitive Reservoir - A reservoir in which there are one or more well completions on each of two or more leases, from which the Lessees plan future production. (This definition appears to exclude injection and salt water disposal wells, since neither type of well "produces" oil or gas. However, a producible well which is temporarily abandoned may suffice.)

Also, compare the above requirements with the requirements which must be satisfied under 30 C.F.R. § 250.190(b). A reservoir must be "reasonably delineated and productive" before a RS may authorize or order unitization. Thus,

unlike most onshore unitization hearings, production history data such as well production data and p/z plots are not necessary (although it would be helpful) for the RS to find a reservoir to be "competitive."

There are two changes from the previous OCS Order 11 definition of a "competitive reservoir." First, the definition was loosened to require only two well completions of any kind on opposing leases. Second, the restriction that offset lease or operating interests must be different was eliminated. Thus, you could seek a competitive reservoir determination for two adjacent leases that you own. Why do it? Perhaps your leases are adjacent to an undeveloped but leased block onto which the particular reservoir extends. Obtaining a competitive reservoir determination now will speed the unitization process later if the third party develops its lease and begins to drain your two lease blocks.

- ii. Reservoir - Note, that the old OCS Order 11 definition of "reservoir" has been abolished. Instead, the MMS limited the applicability of the definition of the term "reservoir" by defining the term only in the introductory section of the Model Unit Agreement which is technically inapplicable to a competitive reservoir determination: "Reservoir" means an underground porous, permeable medium containing an accumulation of oil or gas or both. Each zone of a general structure containing such an accumulation that is separated from any other accumulation of oil or gas or both in the structure is a separate "reservoir." 30 C.F.R. § 250.194(a). The new definition of a "reservoir" sharpens the focus of what constitutes a "separate reservoir."
- c. Well Completions. The well completions need not be perforated and producing in order to subject an OCS lease to a competitive reservoir determination. Moreover, note once again that the reservoir need not be "reasonably delineated" as in a unitization

proceeding for currently producing leases, to be determined by the MMS to be a competitive reservoir.

3. Joint Plan of Production. If the MMS determines the reservoir to be competitive, then for drilling or producing operations to be conducted in the reservoir, the operators must submit and operate pursuant to a Joint Plan of Production. 30 C.F.R. § 250.191(c). Note that the MMS only requires the plan to establish MPRs (and MERs for rate sensitive reservoirs per 30 C.F.R. § 250.171) for the reservoir and allocate those rates of production to each lease. Sharing of costs is not required. Generally, the Plan establishes rates of production for each completion in the reservoir. The rates are usually reviewed every six months by the MMS for adjustment. Compare this with an MMS unitization order which establishes parties' equities in the affected reservoirs only one time with no subsequent MMS adjustments, absent error or fraud in the original determination, and on a net acre foot of pay basis.
 - a. Note also, that no joint operating agreement between the parties for producing the particular reservoir is necessary.
 - b. The relationship between a 30 C.F.R. § 250.191 competitive reservoir and a 30 C.F.R. § 250.171 "rate sensitive" reservoir is unclear. Can a Lessee have that portion of a reservoir which underlays its lease declared "rate sensitive" and thereby force a similar MMS determination on the rest of the reservoir which lies outside the boundary of its lease? Or would the MMS not act at all, thereby causing the Lessee to unilaterally limit its own rate of production? The issue is sufficiently unclear that a Lessee should probably ask for a competitive reservoir determination and a rate sensitive determination at the same time.
 - c. Application for Downhole Commingling. See Section XI.J *supra* for a discussion of the potential affect of filing an application for a permit for downhole commingling upon a competitive reservoir determination.

G. Unitization - Generally: 30 C.F.R. § 250.190

1. **Scope.** Unitization may be approved or required for exploration, development and/or production purposes. 30 C.F.R. § 250.190(a). Thus unitization sweeps more broadly than a competitive reservoir determination (CRD), since a CRD requires as a prerequisite that wells be drilled and completed on opposing leases.
2. **General Requirements-All Unitizations.** Unitization may be approved or required by the Director for three reasons (*cf.* § 102.011 of Texas Natural Resources Code, Mineral Interest Pooling Act, wherein the Railroad Commission may not institute a forced unitization on its own volition):
 - a. **Prevention of waste.** This appears only to apply to physical waste (dissipation of reservoir energy) and *not* economic waste.
 - b. **Conservation of the natural resources of the OCS.** This includes marine and environmental resources as well as oil and gas. A recent case confirmed that the MMS reasonably concluded that preventing the drilling of unnecessary wells (conservation of financial resources) was "in the interest of conservation." *Clark Oil Producing Co. v. Hodel*, 667 F. Supp. 281 (E.D. La. 1987); *See also, U.S. v. Alexander*, 602 F.2d 1228 (5th Cir. 1979); and *Union Oil Co. of California v. Morton*, 512 F.2d 743 (9th Cir. 1975).
 - c. **Protection of correlative rights in the oil and gas, including the federal royalty interest.** See the definition of "correlative rights" at 30 C.F.R. § 250.2, which is somewhat helpful in clarifying what correlative rights constitute.

"Correlative rights," when used with respect to Lessees of adjacent tracts, means the right of each Lessee to be afforded an equal opportunity to explore for, develop, and produce, without waste, oil or gas, or both, from a common source.

However, unlike certain state conservation commissions, informally the MMS interprets the phrase *not* as a mechanism for equalizing geologic advantages/disadvantages of particular Lessees, but to help a Lessee overcome artificial exploration or development impediments, such as a shipping fairway across a block, or the presence of special biological resources, or a Department of Defense military restricted area. Do not be lured into making that argument to the MMS, as it will be rejected *pro forma* and make you look like you do not understand the MMS regulations.

3. It is unclear whether one of the three conditions is sufficient basis for the Director to authorize or order unitization or whether *all* three conditions must be present. The *Sun Oil Company et al.* decision implies, but never asserts that unitization may be authorized primarily to protect correlative rights. 91 IBLA at 27, 37 and 38. The 1988 revised offshore regulations inserted the disjunctive "or" between the three conditions. 30 C.F.R. § 250.190(a). The discussion of the change at 53 Fed. Reg. 10,682 (April 1, 1988) is five words in length: "The suggestion has been adopted." Compare the enabling language in Section 5 of the OCSLA, as amended, which states that "[t]he Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste *and* conservation of natural resources of the [OCS], *and* the protection of correlative rights therein." 43 U.S.C. § 1334(a) (emphasis added).

Two conclusions are in order. First, to protect a unitization order, try to have the MMS state that unitization is mandated for all three reasons above. Second, any unitization order which is founded only upon one of the three factors is subject to attack on the basis of the language contained in 43 U.S.C. § 1334(a).

4. Separate Additional Requirements. The Director must also independently find for exploratory units that such action will "expedite and promote exploration and development efforts." For currently producing reservoirs a tougher standard is applied. The Director must also find that the reservoir is "reasonably delineated and productive." (This simultaneously loosens the standard for exploratory units and increases the burden to be satisfied for already drilled leases as compared to

the former 30 C.F.R. § 250.50(c).) However, the unit must include the minimum acreage required to permit such reservoirs "to be served by a minimum number of platforms, facility installations, and wells necessary for the efficient exploration for or development and production of oil and gas." 30 C.F.R. § 250.190(c). Note, however, that the Lessee is still subject to due diligence requirements for at least post-1978 OCS leases. 43 U.S.C. § 1335(b)(4).

5. Allocation of Costs and Benefits. In the absence of the parties' agreement on the allocation of unit costs and benefits, the Director will likely allocate prospective costs and benefits (i.e., prospective to the date of the unitization order) on an equitable basis. 30 C.F.R. § 250.190(d).
 - a. The Director will not order pre-unitization capital costs to be reallocated amongst the unit owners. *See, e.g.,* Article 7.1 of the Model Unit Operating Agreement. 30 C.F.R. § 250.194.
 - b. The Director possesses authority to award interest as part of an allocation of benefits/production in a unitization proceeding. *See, Clark Producing Co. v. Hodel*, 677 F. Supp. at 292.
6. Lease Maintenance. "Drilling, production, and well-reworking operations performed in accordance with a unit agreement shall be deemed to be performed for the benefit of all leases that are subject in whole or in part to the unit agreement." 30 C.F.R. § 250.190(f).
7. Segregated Leases. There are no Pugh clauses in OCS leases. Unitization apparently maintains both the portion of any lease which is included within the unit and the portions outside the unit. 30 C.F.R. § 250.190(h). In accord 30 C.F.R. § 250.194(a). *See also* Article 13.1 and Article 17.1(d) of the Model Offshore Unit Agreement.
8. Inconsistent Terms. The terms of the unit agreement control over inconsistent terms of an underlying lease. OCS Lease Form MMS-2005 § 16 (March 1986); 30 C.F.R. § 202.100 (e)(1).
9. After a unit agreement has expired, the individual OCS leases may still be maintained by operations, suspensions of

production, or also by rentals if the lease is still in its primary term. 30 C.F.R. §§ 250.50(e) and (i).

H. Voluntary Unitization: 30 C.F.R. § 250.192

1. Parties may voluntarily unitize two or more OCS leases. They must file a unit agreement which conforms to the MMS Model Unit Agreement. (A party may seek variances from the terms of the Model Unit Agreement, and these variances are often granted.)

Note that 30 C.F.R. § 250.194 contains two forms of a Model Unit Agreement, one for exploratory purposes and another for leases which are currently producing.

2. The parties must also submit geological and geophysical data which shows that the proposed unitization meets the criteria of 30 C.F.R. § 250.192(a).

I. Compulsory Unitization: 30 C.F.R. § 250.193

1. Who May Initiate. Compulsory unitization may be initiated either by an operator in a proposed unit area, or by the Director himself. 30 C.F.R. § 250.193(b)(1). (*Cf.* the Mineral Interest Pooling Act in Texas where the Railroad Commission cannot invoke its own jurisdiction; and *cf.* LSA-RS 30:5 (1983) and Rule 1, Rules of Procedure for Conducting hearings before the Commissioner of Conservation of the State of Louisiana, where an overriding royalty owner can initiate the unitization procedure.) See *Tidelands Royalty Corp. "B" v. Gulf Oil Corp.*, 804 F.2d 1344 (5th Cir. 1986) where the federal rule made a difference in the outcome of a lawsuit.

Usually, only currently producing reservoirs are involved. The author knows of no compulsory exploratory units although the regulations contemplate that possibility.

Again, see the 30 C.F.R. § 250.2 definition of a "Lessee." The reference in 30 C.F.R. § 250.193(c)(2) to "all parties owning an interest in the proposed unit" suggests that the narrow definition of Lessee in 30 C.F.R. § 250.2 may have been intentional. *Cf.* the definition of "Lessee" at 30 C.F.R. § 206.101 for royalty payment purposes.

2. Lessees seeking to force unitization must file a request with the Director, along with a proposed unit agreement, unit operating agreement, initial plan of operations, and supporting geological and geophysical data. 30 C.F.R. § 250.193(1).

Lessees must simultaneously serve copies of the requests on the non-consenting working interest owners in the OCS leases which are subject to the request.

3. If the Director seeks unitization, then the Director must serve on all Lessees a proposed unit agreement as well as a statement of reasons for the proposed unitization.
4. Hearing. There must be a hearing before the MMS prior to unitization. 30 C.F.R. §§ 250.193(c)(1) and (2).
 - a. Any Lessee may request a hearing within 30 days of service of notice of the proposed unitization.
 - b. No hearing may be held by the MMS without 30 days' advance written notice to all parties "owning an interest" in the proposed unit. Note, that it is unclear whether the phrase "owning an interest" includes overriding royalty interest owners or lienholders in the affected leases.
 - c. All Lessees within the proposed unit area as of right may submit their positions orally and in writing and question the party seeking unitization.
 - d. The hearing is informal. However, witnesses may be cross-examined, and a transcript will be made. 30 C.F.R. § 250.193(c)(2).

J. Factors Influencing the MMS Unitization Decisions

1. Varying Royalty Rates of Adjacent Blocks. The MMS will attempt to maximize federal royalty collection and will unitize not only to prevent drainage from a higher royalty block, but will often unitize in order to *maximize* production from the higher royalty block.
 - a. In fact, the revised offshore operating regulations now specifically state the MMS may unitize to protect federal royalty interests. 30 C.F.R. § 250.190(a).

- b. Pricing. The price received for production can directly impact royalty payments and the MMS may also consider this factor. If you are aware of a pricing discrepancy between yourself and the opposing party, try subtly to get that fact before the MMS.
- 2. Delineation of the Reservoir. The MMS will review the number of wells completed in (and not just penetrating) reservoir. Prudent development techniques dictate that deeper productive zones be produced first. However, if you are attempting to unitize shallower horizons, be prepared to answer an opponent's question, why none of the already drilled wells are completed in the shallower zones.

Note also, that negative correlations, i.e., dry holes on the affected or adjacent leases, also serve to delineate a reservoir. Be sure to check the MMS's well records for any such dry holes.

- 3. Production history of reservoir, if any, and especially if well log data is subject to varying interpretations.

The P/Z plot for gas producing reservoirs. A P/Z plot is the reservoir pressure corrected for the compressibility factor versus the cumulative gas production.

- 4. Availability of 3-D geologic data, although generally the MMS discounts the use of any seismic data. Instead, the MMS places priority on interpretations from well logs.
- 5. Comparative bottom-hole and shut-in tubing pressures. Note, however, that the MMS prefers to rely upon actual measured bottom-hole pressures.
- 6. Gas-to-oil ratios in unitizations involving oil production. *See* 30 C.F.R. § 250.171(d).
- 7. Lessees' diligence in developing their respective blocks. Section 8(b)(4) of the OCSLA, as amended, requires all post-1978 OCS leases to contain due diligence requirements. 43 U.S.C. § 1337(b)(4). Is there perhaps a long lag time between a Lessee's completion of a well and installation of production facilities?

8. The type of reservoir, and reservoir drive (i.e., whether it is a pressure depletion, water drive, or combination drive reservoir). For example, see the comment at 53 Fed. Reg. 10,596, 10,668 (April 1, 1988) about rates of production for water drive gas reservoirs.

K. Informal MMS Guidelines Regarding Unitization

1. Horizons Unitized. The MMS follows a number of informal rules regarding unitization which can significantly affect the outcome of the unitization process. First, the MMS does not like to unitize a single reservoir. The MMS prefers to unitize at least the entire vertical section of the lease from the surface down to the base of the reservoir in question. Compare this to a competitive reservoir determination which only affects the reservoir in question.
2. Retroactive Effect. An order requiring unitization will not be given retroactive effect. It will be effective as of the date issued. The MMS adheres to this rule in order to encourage Lessees to drill wells on potentially unitizable blocks. See Article 12.1 of the Model Exploratory Unit Agreement and Article 10.1 of the Model Development and Production Unit Agreement.
3. Capital and Operating Expenditures. The MMS also will not order a retroactive allocation of capital or operating expenditures, i.e., expenditures which were incurred by any Lessee prior to an MMS order requiring unitization. 30 C.F.R. § 250.190(d). See also, Article 11.4 in the Model Exploratory Unit Agreement which also negates retroactive allocation of production. Note, however, that the parties may voluntarily retroactively allocate capital or operating costs in its unit operating agreement and the MMS will approve such an arrangement. The ability to shift such costs between unitized or adjacent non-unitized blocks may be important for lease preservation purposes- i.e., shifting costs so that each lease maintains production in paying quantities.
4. Undrilled Leases. Although the MMS maintains an official position to the contrary, the MMS previously allowed a Lessee to include an undrilled lease within a producing unit so long as a portion of the unitized formation reasonably extends onto that block and so long as that particular Lessee did not initiate the unitization process. The interpretation of the revised

phrase "reasonably delineated and productive" in 30 C.F.R. § 250.190(b) will ascertain whether this practice will continue. This is a potential method to maintain an undrilled block without drilling or committing to drill a well. *Cf.* a competitive reservoir determination which requires wells to have been drilled on each lease as a jurisdictional prerequisite.

Remember, however, that when a Lessee seeks a Suspension of Production (SOP) for an individual block, the MMS requires the Lessee to commit to the drilling of a well as a precondition to granting the SOP. 30 C.F.R. § 250.10.

5. Payment of Royalties. Note, however, that unitization of a block will *not* affect the royalties paid on production allocated to that block. That is, a Lessee may not avoid payment of higher royalties on one block by unitizing that block with a block subject to a lower royalty rate and then attributing all current production to the lower royalty block. Article 12.1 Exploratory Unit Agreement form or Article 10.1 Development Unit Agreement form.

The MMS will require for royalty payment purposes that production be allocated back to each block in proportion to the unit interest attributed to each block -- even if only one unitized party is taking or selling unit production. In addition, the price of the allocated production will be the price that the actual selling party received. 30 C.F.R. §§ 202.100(e)(1) and 150(e).

Note: For that reason, it is very important to address the royalty allocation/gas price issue in the Unit Operating Agreement, and gas balancing agreement, if any.

6. Allocation of Production. The MMS will usually allocate production from a reservoir based on the productive net acre feet underlying each leasehold prior to production from the reservoir. *Texaco Inc.*, 51 IBLA 332 (1980). (Production should be allocated in net acre feet save in unusual circumstances). *Sun Oil Co.*, 91 IBLA 1, 54 (1986). *Cf.* Article 12.1 of Unit Agreement. In the *Sun* case, the MMS approved at least one unit which utilized both net acre feet and reservoir production history. *Id.* at 30-31.

Note, that in onshore unitization hearings that reservoir production history is usually the primary factor in allocating

production between the contestants. See, *Sun Oil Co.*, at 30-35 for a discussion of the reason for distinction between onshore and offshore reservoirs.

7. While the MMS provides two form Unit Agreements, it is fairly flexible on incorporating Lessee-generated revisions based on "good cause" into the Agreement. 30 C.F.R. § 250.192(b). Revisions must be requested at the time the proposed Unit Agreement is submitted.

L. The Model Unit Agreements: 30 C.F.R. § 250.194

1. Summary. The MMS formally incorporated two forms of a model unit agreement into the May, 1988 revisions to the OCS operating regulations. *Id.* One form is for units which contemplate at least some exploratory activity, while the other form is for currently producing properties for which unitization is contemplated. The differences between the two forms however, are not substantial. The primary difference is that the exploratory unit form contains three provisions, Articles 11, 12, and 13 which require the participants to contract the exploratory unit once the boundaries of the producing reservoirs become clear. Since a producing unit by definition can only be ordered or authorized for a reservoir that is reasonably delineated, this problem will not arise.

A number of provisions contained in both forms are of note. Also a couple of standard revisions to the model forms should be routinely requested from the MMS.

2. Section 7.1 - Unit Operating Agreement. The co-owners must enter into an operating agreement. The agreement must allocate costs, liabilities, and income "incurred in maintaining or conducting operations." The language reinforces an unwritten MMS rule previously mentioned that the MMS will not force a retroactive allocation of capital (or operating) costs incurred by a co-owner prior to unitization.

In other words, do not seek unitization thinking that the MMS will help your economics by approving reallocation of capital costs incurred prior to the unitization order. However, the parties may voluntarily reallocate capital or operating costs incurred prior to unitization.

3. Section 7.2 - Inconsistent Terms. The terms of the MMS form Unit Agreement control over inconsistent terms contained in the Unit Operating Agreement.

Note concurrently, that the terms of the Unit Agreement also control over inconsistent terms contained in the MMS OCS Lease Form MMS-2005. Query: Could a party utilize this as a method to transfer record title holder liability under Sections 12 and 14 of the OCS lease form to the operator or farmouttee?

4. Article 9 - Plan of Operations. The unit operator must submit a Plan of Operations along with its Unit Agreement. No significant formalities are required in the plan itself, except that the plan must be consistent with previously filed and approved Exploration or Development and Production Plans for the underlying leases.
5. Article 11 - Participating Areas. The MMS requires the unit operator to designate what portions of the underlying leases "reasonably proven to be productive of unitized substances in paying quantities" prior to or soon after production commences. The designation has two effects: first, any lease for which no portion thereof is included within the Participating Area will be dropped from the unit under Article 10; and second, if production is allocated based on surface area of the reservoir underlying each lease, then a Lessee's portion of production will be determined by the designation.

Note: It is important to address just how the designation of a Participating Area will occur in the Unit Operating Agreement. Otherwise, you might be forced to live with an unsatisfactory unilateral designation made by the unit operator.

6. Article 12, Exploratory Unit Form, and Article 10.4, Development Unit Form - Allocation of Production. Note that the regulatory language requires the unit operator to pay *all* production royalties. Generally, royalties are paid on a "take" basis offshore instead. Be sure to seek revision of this requirement if you desire each party taking production to pay its own royalties.
7. Article 20 - Remedies. The remedies provision contains the draconian standard that any termination of the Unit Agreement based on default of any term is effective on the

date of default. This is also a prime candidate for revision. One suggestion involves asking the MMS to make termination effective only retroactive to the date of *notice* of default so that the provision makes sense.

XVIII. Dealing with the MMS, the EPA, the OSHA, the OPS, and the U.S. Coast Guard

Summary. Unlike onshore oil and gas leasing, almost every decision or course of action by a Lessee or permittee on the OCS involves interaction with one or more federal governmental agencies. One needs to be familiar generally with the basic procedures for agency decisionmaking as well as with each agency's inspection and enforcement powers.

A. Agency Decision-Making

Basically, a federal, state, or local governmental agency engages in two distinct types of decision-making: (1) mandatory or ministerial decisions; and (2) discretionary decisions.

1. Ministerial decisions are mandated by law. The agency has no discretion in whether to implement the decision. It must implement the decision once the requisite qualifications are shown.

The only tasks to be performed by the agency are the ministerial tasks such as correctly filling out the relevant documents.

For example: Release of geologic data under 30 C.F.R. § 250.18(a) after the requisite time limit has passed.

2. Discretionary decisions are permissive actions which an agency may or may not take. While an agency may need to exercise its discretion pursuant to some statutory standards, the agency itself decides whether it will take action in a specific case.
 - a. For example: The decision whether or not to unitize two leases, or to grant an OCS lease suspension.
 - b. The majority of decisions taken by an agency are discretionary in nature.

B. Influencing Discretionary Agency Decision-Making

1. Rule Number One: Always treat government employees with courtesy and respect. No snide or confrontational comments. A reputation of respect for and cooperation with agency employees will assist a party both in obtaining favorable decisions and in obtaining such decisions in a speedy fashion.
2. Rule Number Two: All other factors being equal, agency decision makers will favor individuals with whom they are personally acquainted. For example, it is very important that at least some people in your company frequent the MMS Metairie and Lakewood Offices on a regular basis and become acquainted with the various section heads of the MMS Operating and Royalty Accounting Departments.
 - a. Review the distinctions between the positions of MMS District Supervisor, Regional Supervisor, and Regional Director and their various levels of authority. 30 C.F.R. § 250.2.
 - b. Review the Organization and General Flow of Functions for the U.S. Coast Guard. The positions from the Commandant of the U.S. Coast Guard to the underlying Chiefs of various operating divisions as well as their authority are succinctly summarized at 46 C.F.R. §§ 1.01-10.
3. Rule Number Three: Seek to influence agency decisions with limited publicity and in an informal fashion. Quiet, behind the scenes negotiations will consistently yield better, faster results than public, formal agency decision-making processes.

C. Accidents, Fires, Sinkings, Loss of Well Control, and Oil Spill Investigations

1. Jurisdiction. Section 22(d) of the OCSLA Amendments requires the MMS and/or U.S. Coast Guard to investigate each major accident, fire or oil spill (200 barrels) and issue a public report thereon. 43 U.S.C. § 1348(d).

Additionally, the MMS and the U.S. Coast Guard are required to investigate loss of well control, sinkings, and capsizings etc., pursuant to various regulatory schemes. The jurisdictional demarcation line between the agencies' investigative powers

was previously somewhat unclear. That situation changed with the conclusion of the August 29, 1989, MOU between the MMS and the U.S. Coast Guard. 54 Fed. Reg. 39,820 (September 28, 1989).

The MOU allocated responsibility to act as lead agency for investigative purposes where overlapping responsibilities existed on a subject matter basis. The agencies agreed to allocate investigative jurisdiction as follows:

- a. Collisions. The U.S. Coast Guard is lead agency.
 - b. Blow Outs, Fires, and Explosions. The MMS is normally lead agency. However, the U.S. Coast Guard will be requested to participate in all investigations of fires or explosions that involve death or injuries.
 - c. Injuries and Deaths. The U.S. Coast Guard is lead agency. However, the MMS will be requested to participate in all investigations involving death or injury associated with drilling or production operations or equipment therefor.
 - d. Pollution. The MMS will be lead agency involving pollution from OCS facilities. However, the U.S. Coast Guard will also be requested to participate.
 - e. Facilities, Material, and Equipment. Drilling facilities or vessels: U.S. Coast Guard is lead agency. OCS production facilities: MMS is lead agency.
2. Notice of Casualty. The MMS must be notified whenever there is a serious accident, injury, death, or any fire, explosion, or blowout "connected with any activities or operations on the lease." 30 C.F.R. § 250.19(a). All oil or other liquid "pollutants" spills should be reported pursuant to 30 C.F.R. § 250.41(b). (The MMS does not define "pollutants". The author suggests using either the EPA's list of hazardous or toxic chemicals, or check the terms of the applicable NPDES permit for types of unauthorized discharges.).

The U.S. Coast Guard requires similar notice when casualties involve both an OCS facility and one of the following: a death, or injury to five or more persons in a single incident. 33 C.F.R. § 146.30(a).

The U.S. Coast Guard must also be notified of any casualty involving an OCS facility which causes damage to the primary lifesaving or firefighting equipment, injury causing any person to be incapacitated for more than 72 hours, damage to a facility exceeding \$25,000 as a result of a collision with a vessel, and damage exceeding \$25,000 of any floating OCS facility. 33 C.F.R. § 146.30(b).

Report incidents of oil pollution pursuant to 33 C.F.R. §§ 135.305 and 135.307.

Report diving casualties in accordance with 46 C.F.R. §§ 197.484 and 197.486.

3. Conduct of Investigations. Section VI.B. of the MMS/U.S. Coast Guard MOU requires the lead agency or the agency which is actually conducting the investigation to prepare, review, approve, and release the investigative report pursuant to that agency's usual investigation procedures. *See also*, 33 C.F.R. §§ 140.201 and 203.
4. Investigatory Fact-Finding. The hearing is under oath, but is strictly a fact-finding proceeding. 30 C.F.R. § 250.19(c).
5. Inspection and Record Retention. As part of an investigation, the relevant agency may wish to review a Lessee's, permittee's, or operator's operational records. *See*, Article XVI.J.8 for a discussion of how long for the MMS purposes such records must be maintained and made available for inspection.
6. *Rainey v. Beech Aircraft Corporation*, 109 S.Ct. 439 (1988). In *Rainey*, the Supreme Court overturned a long-standing rule regarding admissibility of evidence gathered at administrative hearings and by public investigative reports. The Supreme Court held that *both* findings of fact *and* opinions contained in a public investigative report prepared by a United States Navy investigator were admissible under the public records exception to the hearsay rule.

District courts may still reject factors or opinions contained in investigative reports if the opinions are not based on a factual investigation or are otherwise deemed untrustworthy. However, the significance of administrative reviews, inspections, appeals has been elevated, as conclusions reached by the agency may now bind you in subsequent court litigation.

D. Agency Inspections or Reviews

1. Summary. Both the MMS and the U.S. Coast Guard inspect OCS facilities on an ongoing basis regardless of whether any accident, spill, or injury has previously occurred. Section 22(c) of the OCSLA Amendments requires both the MMS and the U.S. Coast Guard to inspect offshore facilities at least annually for compliance with environmental and safety regulations. 43 U.S.C. § 1348(c); 33 C.F.R. §§ 140.101 and 140.105.

Although the EPA has the power to establish and to enforce effluent discharge limitations pursuant to the CWA, the EPA has given the MMS the power to inspect offshore facilities for violations of any of the limitations. MOU dated May 31, 1984 between the EPA and the DOI, MMS.

The DOT OPS has the authority to enter and inspect any regulated pipeline facility, including OCS pipelines, an authority which may be delegated to an MMS or U.S. Coast Guard inspector. 49 C.F.R. § 190.203(a).

The OSHA, of course, regulates longshoring activities onshore. Such activities frequently relate to OCS exploration, development, and production. Additionally, as previously discussed in Article XII, the OSHA's general duty clause may also apply to OCS operations offshore. For this reason, the OSHA's inspection powers shall also be discussed.

Note that the U.S. Coast Guard also has the power to inspect vessels including drilling units that are engaged in offshore oil & gas activity. 33 C.F.R. § 140.101 and 46 C.F.R. Part 107.

2. Section 24 of the 1978 OCSLA Amendments establishes rigorous penalties for violations of any regulation, lease, license or permit promulgated thereunder if the Lessee or permittee fails to correct the violation after notice. 43 U.S.C. § 1350(b); 30 C.F.R. § 241.20, 33 C.F.R. § 140.103.
3. Civil Penalties for violations: up to \$10,000/day that the violation continues after notice. 43 U.S.C. § 1350(b). However, the MMS has limited the penalty to \$500/day for the first 60 days for each violation specified in the notice. 30 C.F.R. §§ 241.20(a) and (c).

4. Collection of Royalties Generally. For violations of provisions related to "the determination and collection of royalties . . . on the Outer Continental Shelf," the MMS has established under FOGRMA a graduated fine system, beginning at \$500/day subsequent to the service of notice. 30 U.S.C. § 1719: 30 C.F.R. §§ 241.51(a)(1) and (3). Note also, that FOGRMA's penalties technically supplement those of the OCSLA, as amended. 30 U.S.C. § 1719(a)(1). However, given the similarity of penalty schemes between the two Acts, the MMS will likely utilize the scheme under the OCSLA to enforce operational requirements.
5. Criminal Penalties for violation of any provision of the Act: up to \$100,000, or imprisonment of up to ten years, or both. 43 U.S.C. § 1350(c).
6. The MMS/U.S. Coast Guard MOU. The MOU mentioned in Article XVIII.C. *supra* gave both of the agencies the power to report "deficiencies" to the opposing agency which the particular agency's inspector observed while carrying out his own duties. *See*, Section V.A. Inspections, of the August 29, 1989, MOU between the MMS and the U.S. Coast Guard. Theoretically, OCS operators will be under greater scrutiny hereafter. That is important because of the increased number of criminal prosecutions being instituted by the federal government against the oil and gas industry as noted in Article XVIII.E. *infra*.

The U.S. Coast Guard Power to Order Cessation of OCS Drilling or Producing Operations. Section V.B of the August 29, 1989, MMS/U.S. Coast Guard MOU. Ordinarily, one assumes that only the MMS can shut an OCS Lessee in for failure to comply with various operating regulations. While the MOU did not change that arrangement, it did authorize the U.S. Coast Guard to recommend to the MMS that drilling or producing operations be shut down. *Id.* Thus, in light of the U.S. Coast Guard's new power to refer violations which its inspectors discover to the MMS and its new power to recommend to the MMS that drilling or producing operations cease, inspections by the U.S. Coast Guard representatives should be taken quite seriously by OCS operators.

7. The MMS Inspections under the EPA/MMS MOU, Dated May 31, 1984. There is no formal MMS inspection policy. Informally, in the Gulf of Mexico, the MMS does not intend to

verify compliance with the EPA NPDES permit during normal facility inspections, but instead plan to conduct a set number of compliance inspections each year.

The NPDES compliance inspection will proceed as follows: the MMS technician will first ask to see the facility's copy of the NPDES permit. The inspector will then ask some general questions about the permit to see if the person understands the content of the permit. Finally, a records check will occur to see that all of the required information is being recorded. These records entail effluent volume estimations, effluent sampling documentation, and the daily pollution observations.

It would be a good idea to have your employees review the permit and check to see that all required documentation is readily available.

8. The OSHA Inspections and Warrants. The case law and precedent surrounding the OSHA inspections is more extensively developed than that involving OCS operations. Many of the principles discussed here not only apply to many aspects of support operations at onshore shorebases, but also may suggest parallels or may eventually become applicable to the MMS/U.S. Coast Guard inspections of OCS facilities. For this reason the OSHA experience with industrial inspections and subsequent enforcement proceedings is discussed in some detail here.

- a. Types of Inspection. There are potentially five types of OSHA inspections listed here in order of priority:

- i. Imminent danger inspections; these inspections are initiated by employee complaints under sections 8(f)(1) and 13 of the Occupational Safety and Health Act, 29 U.S.C. §§ 657, 662.
- ii. Accident and fatality inspections; employers must report fatalities or incidents in which five or more employees are hospitalized. 29 C.F.R. § 1903.11. The report often triggers an inspection by the OSHA.
- iii. Complaint and referral inspections; section 8(f)(1) requires the OSHA to conduct an inspection if an employee or his union

representative complains in writing to the OSHA that a standard has been or will imminently be violated, and the OSHA has reasonable grounds to conclude that the violation has or will occur. Complaints which are in writing and which satisfy the procedural prerequisites of section 8(f) are dubbed "formal complaints." Oral complaints, or written complaints which do not satisfy section 8(f) requirements are grouped together as "informal complaints." What is the difference? Formal complaints usually result in an inspection. Informal complaints usually only result in a letter from the OSHA to the employer. Only if the employer ignores the letter or fails to abate the specified practice will a subsequent inspection occur.

- iv. General programmed inspections. These are low priority inspections of industries with high accident rates.
- v. National Emphasis Program inspections. The OSHA created various National Emphasis Programs under which the OSHA inspects more frequently workplaces in which, there is exposure to hazardous chemicals or asbestos.

b. The OSHA Inspections, Consent, and Warrants.

- i. Fourth amendment warrant requirement. The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their . . . houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."
- ii. Statutory authorization to enter the workplace and to issue subpoenas. The OSHA inspectors are authorized to enter a workplace at reasonable times without delay in order to inspect and investigate. 29 U.S.C. § 657(a).

Additionally, the OSHA may issue subpoenas both for testimony and documents. 29 U.S.C. § 657(b).

- iii. Requirement of consent or warrant to enter a workplace. In spite of sections 8(a) above, the fourth amendment requires the OSHA to obtain either a judicial warrant or the employer's consent or else they may not enter a workplace. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).
- iv. Requirement of consent, warrant, or subpoena to inspect papers. In spite of section 8(b) above, the OSHA may not inspect papers, including records required by regulation to be kept and produced on demand, unless the OSHA has previously obtained a subpoena or warrant based on probable cause, or has obtained the consent of the employer. *McLaughlin v. Kings Island, division of Taft Broadcasting Co.*, 13 BNA OSHC 1137 (1987), *aff'd* 849 F.2d 990 (6th Cir. 1988); *Brock v. Emerson Electric Co.*, 13 BNA OSHC 1171, *aff'd* 834 F.2d 994 (11th Cir. 1987). *But see Secretary of Labor v. A.B. Chance Co.*, 13 BNA OSHC 1620 (4th Cir. 1988).

Consent to a warrantless search, of course, does not violate the fourth amendment. In fact, failure to object may imply consent. *J.L. Foti Construction Co.*, 12 BNA OSHC 1097.

- v. Limited consent and third party consent. An employer may allow an OSHA inspector upon his property, and then deny the inspector access to certain portions thereof. *Ackermann Enterprises*, 10 BNA OSHC 1709 (1982).

Note also, that the owner of a building or the general contractor at a multi-employer site can waive an employer's right to demand a warrant if that person possesses common authority over or other sufficient relationship to the premises. *Donovan v. A.A. Beiro Construction Co.*, 746 F.2d 894 (D.C. Cir. 1984).

- vi. Plain view exception. Note, that observation of matters from a location for which an inspector has either consent or authority to be, does not violate the fourth amendment -- even if the inspector utilizes accessory instruments such as a pair of binoculars or a telephoto lens. *Titanium Metals Corp.*, 7 BNA OSHC 2173 (1980); *Laclede Gas Co.*, 7 BNA OSHC 1874 (1979).
- vii. Should you require a warrant for entry? The answer is normally no. It is better to consent to a search of your premises, and limit the extent of the consent. The downside to forcing the OSHA to seek a warrant is that you lose complete control of the extent of the search. Also, if you gain a reputation as an employer who requires a warrant or subpoena prior to a search, then the OSHA may always show up unannounced, with a warrant in hand, seeking a "wall-to-wall" inspection. Such type of warrant is valid. *Wollaston Alloys Inc. v. Donovan*, 10 BNA OSHC 2209 (1st Cir. 1982).
- c. Citations. The OSHA enforces its general duty standard and regulations through issuance of citations to employers. See subsection XVIII.G. *infra*.

E. Agency Criminal Investigations

In late 1988, a major oil company operating offshore California, was indicted for "knowingly and willfully" failing to conduct blowout preventer tests required by the MMS operating regulations, and for attempting to conceal the safety violations by filing false reports. Additionally, a drilling company was indicted for "aiding and abetting" the oil company's activities. The oil company paid a \$750,000 fine, while the drilling company paid a \$500,000 fine in return for dismissal of the respective indictments although no oil spill, no injuries, and no waste (i.e., no "harm" as traditionally perceived) occurred.

In June, 1989, another major oil company paid a \$5,000,000 civil fine to settle all allegations that it unlawfully destroyed over a billion cubic feet of gas through unauthorized and unmetered flaring operations in the Gulf of Mexico. Under the terms of the settlement, the government agreed to forego criminal prosecution of the company, and not to seek civil penalties or cancellation of the involved leases.

In September, 1989, in a related matter, the OSHA assessed a \$877,000 fine and alleged 109 "willful safety violations" against a major oil company as a result of a fire at the oil company's Richmond, California refinery. Apparently, the company had failed to provide personal fire protection equipment in an area of the plant where fires had previously occurred, although regular safety meetings including fire equipment training had been held.

The cases signal increased attention by the DOI and the DOJ to OCS safety and environmental violations and also evidence a shift in federal enforcement policy from exclusively civil enforcement and penalties to some criminal enforcement in the area of oil and gas operations.

Under the sentencing guidelines for environmental crimes published by the United States Sentencing Commission pursuant to the Comprehensive Crime Control Act of 1984, 28 U.S.C. § 991(a), serious sanctions may apply. In fact, for violations of provisions of the CWA, the Sentencing Commission has elevated the "minimum offense level" almost up to the statutory maximum of three years imprisonment for knowing crimes. 33 U.S.C. § 1819(c)(2). See B. Sharp and L. Shen, *The (Mis)Applications of Sentencing Guidelines to Environmental Crimes*, 5 Tx. L.R. 189 (July 11, 1990).

1. Investigatory Methodology. In both of the above cases, the United States employed a task force approach. Representatives from the MMS, the Office of the Inspector General, and the DOJ were involved. Additionally, local U.S. Attorney's Office personnel participated in therein.
2. Significance and Purpose. The MMS has decided to supplement the MMS's personnel traditional regulatory expertise with the criminal investigative and enforcement capabilities of the above agencies. The purpose appears to be to create an enforcement team that will deter and, when necessary, investigate and prosecute violations of MMS operating regulations.
3. Causation. Where regulatory violations exist, a concomitant exposure to criminal liability exists. Moreover, this exposure exists not only for local level employees who directly participated in the violations, but also for corporate executives. That is because causation standards in various applicable federal statutes sweep broadly to include the behavior of

higher level officials who indirectly participated in the violations.

The causation provision of the statute most relevant to OCS activity, the OCSLA, as amended, in section 24(d) reads as follows:

Whenever a corporation or other entity is subject to prosecution under subsection (c) of this section the criminal liability section), any officer or agent of such corporation or entity who knowingly or willfully authorized, ordered, or carried out the proscribed activity shall be subject to the same fines or imprisonment, or both, as provided for under subsection (c) of this section.

When an upper level executive sets production or corporate goals or policies, and those goals or policies "cause" employees to ignore statutory requirements, criminal liability may arise.

4. Knowing or Willful Behavior. The following excerpt from a 1987 memorandum by Tom Adams, EPA Assistant Administrator to all EPA Enforcement Administrators reflect the standards applicable to the scienter of intent in enforcing criminal provisions contained in EPA statutes:

"When statutes, such as the environmental laws, are enacted for the purpose of protecting public health and welfare, and especially in subject areas where there is a strong likelihood of protective governmental regulation, the government generally only has to prove that a person knew what he was doing and he did it voluntarily, not accidentally, in order to establish the state of mind required for a conviction. It is not necessary to show that he actually knew what the law required or that he acted with the specific purpose of violating that law. Also, the knowledge necessary for a criminal conviction may be proven circumstantially; it need not always be shown directly. For example, while there may be no direct evidence (such as a statement by the defendant) that he knew a particular material was a hazardous waste, a

document found in his file describing it as such would be good circumstantial evidence of knowledge. Thus employees should be alert to indirect indicators of knowledge and other elements of the offense."

5. Conclusion. Three points are in order. First, the OCSLA, as amended and the various safety and environmental statutes involved in regulating the OCS operations sweep broadly, requiring management to monitor regulatory compliance at all levels of the corporation. Second, there are many considerations that a corporation or its employees as individuals must take into consideration when confronted with a criminal investigation rather than the usual civil enforcement process. Those considerations include whether and how to conduct an internal corporate investigation, how to respond to a grand jury subpoena, whether to enter into immunity negotiations, and whether to assert constitutional rights and privileges. Third, criminal prosecution is more likely today than ever before. (Note: the Office of Inspector General is currently seeking funding to open a permanent New Orleans office in part to monitor the OCS operations.) That potential of prosecution should be kept in mind by any attorney who discovers that his client is under investigation for possible regulatory violations.

F. EPA Enforcement of Clean Water Act/NPDES Permit/Dredge and Fill Permit Violations: 43 U.S.C. § 1319

The enforcement process for violations of provisions of the CWA and various rules and permits issues thereunder varies from the MMS/U.S. Coast Guard enforcement process. The EPA largely relies upon self monitoring by the permittee in order to ascertain any violation of the CWA or the regulations or permits issued thereunder. (Note: The Army Corps of Engineers has parallel authority to enforce provisions of the Section 404 Dredge and Fill Permit Program. See Article XII.O.d.7 for a brief discussion of its powers and procedures.)

The EPA has many options available to enforce sections 301, 302, 306, 307, 318, 405 of the CWA, and permits issued under sections 402 or 404. 43 U.S.C. § 1319(a)(3).

One significant and unique provision which is not available to the MMS or the U.S. Coast Guard is the "blacklisting provision" of the

CWA which affect the federal contracting ability of companies convicted of criminal violations of the CWA as will be discussed below.

Note, that the CWA contains an additional enforcement mechanism for those who are not satisfied with self monitoring. Equally as significant is the citizen suit enforcement provision of the CWA. 43 U.S.C. § 1365. Public and private interest groups may use the provision to monitor and ensure ongoing compliance with provisions of any rule, permit, or effluent standard issued under the CWA. See, *Sierra Club v. United States*, No. 80-B-76 (D. C. Colo. 5/24/90) wherein the DOI agreed to build a water treatment plant in order to settle a dispute over drainage from mines pursuant to an NPDES discharge permit.

One Federal Circuit Court of Appeals also recently ruled that a federal agency can be sued for state civil penalties under an EPA approved state water pollution control program for CWA violations. *Ohio v. Department of Energy*, No. 89-3329 (6th Cir. June 11, 1990). But cf., *New Mexico Health and Environmental Department v. Air Force Department*, 5 Tox. L. Rep. 74 (10th Cir. 1990).

1. Compliance Order. The enforcement process begins with the EPA's issuance of a compliance order. Unlike the MMS under section 24(b) of the OCSLA, as amended, 43 U.S.C. § 1350(b), and except as noted in the following paragraph, the EPA is not required to allow a period for corrective action prior to citing the person with violation of any of the above sections. 43 U.S.C. § 1319(a).

The compliance order itself must state a reasonable time for compliance where a final deadline has been violated, and take into account the seriousness of the violation as well as any good faith efforts to comply. 43 U.S.C. §§ 1319(a)(3) and (a)(5)(A).

Note, however, that unlike section 24(b) of the OCSLA, as amended, issuance of a compliance order does not preclude a subsequent civil action by the EPA. 43 U.S.C. § 1319(b).

2. Administrative Penalties. The 1987 Water Quality Act amendments to Section 309 of the CWA gave the EPA the power administratively to impose fines for violations of the CWA. 43 U.S.C. § 1319(g). The amendments created two categories of fines, Class I and Class II fines. Class I civil

penalties range from up to \$10,000/violation, but may not exceed a \$25,000 total fine. The procedure is informal and subject to the requirements of the Administrative Procedure Act. 5 U.S.C. §§ 554, 556. The violator must be given notice of the proposed penalty and an opportunity to request a hearing. The hearing usually consists of a trip to the regional EPA headquarters and discussions with the lower level EPA operations employees in charge of the file. *See* 52 Fed. Reg. 30,730 (August 17, 1987) Notice of Availability of Procedural Guidance for Class I Proceedings.

A Class II civil penalty ranges from up to \$10,000/violation, but not to exceed a \$125,000 fine. Here, the violator has the right to request a formal hearing subject to the requirements of the Administrative Procedures Act (APA). 40 C.F.R. Part 22.

In Part 22 the EPA created a common set of procedural rules for a number of EPA's administrative penalty programs. The Rules provide for assessment of penalties only after an opportunity for a hearing on the record. On June 12, 1990, the EPA decided that Class II penalty hearings also would be subject to these Consolidated Rules of Procedure. 55 Fed. Reg. 23,838 (June 12, 1990).

In either case, the EPA examines the nature, circumstances, extent, and gravity of the violation(s). Significantly, the EPA also considers the person's prior history of violations (remember, this is a civil penalty proceeding), degree of culpability, ability to pay, and the economic benefit or savings to the party as a result of its violation(s).

Note too, that the EPA treats a single operational upset which causes violation of multiple pollution parameters in an NPDES permit as a single violation of the permit in administrative penalty proceedings as well as civil actions as next discussed.

3. Civil Actions. The EPA may also commence a civil action against a putative violator instead of assessing an administrative civil penalty or where the amount of penalty it seeks exceeds its Class II administrative penalty authority. 43 U.S.C. § 1319(b).

4. Civil Actions -- Potential Exposure/Available Relief. Similar to an administrative hearing, the EPA may seek monetary penalties except that the person may be fined up to \$25,000 a day/violation. The EPA considers the same factors noted in subsection (2) above in deciding how much of a fine to seek, as well as the economic impact of the penalty on similar future violations.

The EPA may also seek a temporary or permanent injunction preventing continued or future violation of the terms of the relevant permit. Generally, entering into a consent order pursuant to an injunction exposes the party to future "streamlined" EPA enforcement as follows. The injunction usually contains terms including specific monetary penalties which the party must pay should it violate the terms of the injunction. Then, the injunction usually incorporates the terms of the underlying permit by reference. Thus, the EPA may avoid going through the administrative penalty process altogether and simply immediately sue the party in court for failing to live up to the terms of the injunction.

Thus, a party should exercise extreme care prior to agreeing to enter into a consent order.

5. Civil Action-Right to Jury Trial. A party has the right to a jury trial even in a civil action on the issue of liability. *Tull v. United States*, 107 S. Ct. 1831 (1987).
6. Criminal Prosecutions. 43 U.S.C. § 1319(c). Note, that the standard of care for violation of certain sections of the CWA as well as terms contained in the NPDES or dredge and fill permits is merely negligence. While the financial penalties and potential period of incarceration are not substantial, please note the potential interaction with section 508 of the CWA which is discussed in subsection (6) next.
7. Blacklisting. 43 U.S.C. § 1368; 40 C.F.R. § 15.10. Section 508 of the CWA prohibits federal agencies from entering "into any contract with any person, who has been convicted of any offense under section 1319(c) of this title." The prohibition appears to extend to only federal procurement activities.

However, might a future EPA administrator read the prohibition more broadly to exclude individuals from obtaining permits or even OCS leases from the DOI under the OCS Lands, as amended? Logically, one would conclude not. The possibility along with the lower standard of care for finding criminal liability contained in 43 U.S.C. § 1319(c)(1) does raise the fact that each OCS Lessee or permit holder must exercise care not to become embroiled in a criminal prosecution.

8. Citizen Suits. 43 U.S.C. § 1365. As a supplemental enforcement tool any citizen may commence a civil action against any person alleged to be violating an effluent standard, limitation, or order issued pursuant to the CWA or against the EPA for failing to perform any nondiscretionary act or duty. While section 1365 has resulted in the development of a large body of case law, it is sufficient to remember that the EPA is not the only party with standing to challenge a party's activities under a NPDES or dredge and fill permit. In fact, Unocal Corporation recently agreed to pay \$5.55 million dollars in order to settle a lawsuit brought against the company by the Sierra Club Legal Defense Fund for allegedly illegally discharging tons of petroleum wastes into San Francisco Bay contrary to the terms of an NPDES permit.
9. State Criminal Prosecution under Traditional Common Law Theories. See, Humphrey, S., *An Enemy of the People: Prosecuting the Polluter as a Common Law Criminal*, 5 Tex. L. Rev. (BNA) 226 (July 18, 1990) for a discussion of state prosecution of egregious environmental conduct as a common law crime. See also, Subsection G(9) *infra* for a discussion in the context of the Occupational Safety and Health Act of whether federal law preempts state criminal prosecutions when federal officials take no action under the applicable federal regulatory scheme.

G. OSHA Enforcement Proceedings

Section 9(a) of the Occupational Safety and Health Act authorizes the OSHA to issue citations if the inspector believes that an employer has violated a standard, regulation, rule, or order issued thereunder. 29 U.S.C. § 658(a).

1. Contents of a citation. An OSHA citation will contain a description of the alleged violation, the rule, regulation, or standard violated, a proposed method of abatement and period

to accomplish that fact (Note, that OSHA's proposed method of abatement is not binding on the employer; *Cyprus Wire and Cable Co.*, 11 BNA OSHC 1063, 1066 (1982).), an allegation that the violation(s) is "willful, repeated, serious," or "other than serious," and notification pursuant to section 10 of a proposed penalty. 29 U.S.C. § 659(a).

2. Procedural requirements for citations. The citation must "describe with particularity the nature of the violation", and be issued "with reasonable promptness." 29 U.S.C. § 658(a). This appraises the employer of the alleged violation so that corrective action may be taken. However, a court will only vacate a tardily-issued citation if the delay adversely affected the employer's ability to defend against the charge. *Stephenson Enterprises Inc. v. Marshall*, 578 F.2d 1021, 1023 (5th Cir. 1978).
3. Statute of limitations. No citation may be issued "after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). However, the period is tolled if the OSHA could not reasonably have discovered the violation within that period. *Kaspar Wire Works Inc.*, 13 BNA OSHC 1261 (1987).
4. Effect of issuance of a citation. Issuance begins the employer's 15-working day period for contesting the citation. Failure to contest results in the citation and proposed penalties becoming a final order of the Commission which is not subject to review by any agency or court, unless one can satisfy the requirements of Federal Rule of Civil Procedure 60(b), or the employer was "misled" by OSHA. *Branciforte Builders Inc.*, 9 BNA OSHC 2113 (1981); *Atlantic Marine Inc. v. OSHRC*, 524 F.2d 476 (5th Cir. 1975).

Timely contest forces the OSHA to prove to the independent Commission that the violation occurred, and that the proposed penalty and abatement period is reasonable.

If the Commission affirms the citation, then the employer has the obligation to abate within the proposed period and to pay the proposed penalty.

5. Contesting an OSHA citation. The OSHA now requires a notice of contest to be in writing. The notice must be delivered to OSHA, *not* the Commission. *Fitchburg Foundry Inc.*, 7 BNA OSHC 1516 (1979). Finally, the notice is effective

upon mailing, and not upon receipt by the OSHA. *Electrical Contractors Association Inc.*, 2 BNA OSHC 1627 (1975).

Important: Contest the entire citation. A notice of contest which on its face only objects to the proposed penalties or abatement period is considered to have waived contesting whether characterization of the violation is correct. *Florida East Coast Properties Inc.*, 1 BNA OSHC 1532 (1974). There is an exception to the rule called the "Turnbull exception," but the author advises avoiding having to argue the exception. *Turnbull Millwork Co.*, 3 BNA OSHC 1781 (1975).

6. Types of violations. The OSHA classifies violations into one of four categories. Note, that knowledge is an element of all violations. The employer need not be shown to have had knowledge that the cited condition violated the Act, but only that the condition existed. *Southwestern Acoustics & Specialty Inc.*, 5 BNA OSHC (1977). The categories are as follows:
 - a. Willful. The employer may be penalized up to \$10,000. 29 U.S.C. § 666(a). Indirectly, such a classification may bring the condition within the state law's willful injury exception to the exclusivity of a workers' compensation award. Note too, that failure to litigate a civil OSHA citation of willfulness especially involving a fatality may encourage criminal prosecution.
 - b. Repeated. The term is not defined by the Act. The Commission defines a "repeated violation" as "if at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061 (1979). An employer may be penalized up to \$10,000. 29 U.S.C. § 666(a).
 - c. Serious. For a "serious" violation, a penalty *must* be assessed. Maximum penalty is \$1,000. The Act defines a "serious" violation as where "there is a substantial probability that death or serious harm could result from a condition which exists" in the workplace unless "the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." The OSHA does not have to demonstrate that an accident is likely to occur. Instead, the OSHA need only show that if an accident does occur, that

there is a substantial likelihood of serious injury. *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1985).

- d. Non-serious. Maximum penalty is \$1,000. However a penalty need not be assessed. Thus, classification of a violation as "non-serious" or "other" has little practical consequence.
7. Civil penalties. Unlike the EPA or the MMS civil penalty process, the OSHA bifurcates the proposal and assessment phases of the civil penalty process. Under section 10(a) of the Act, the Secretary of Labor has the authority to propose civil penalties. However, only the Commission can actually assess penalties. 29 U.S.C. § 659(a). This may give the OSHA process a little more objectivity than the EPA or the MMS, where essentially the same agency group will investigate, propose and enforce a civil penalty proposal.

Note also, that as of late 1989, the OSHA conducted roughly 50,000-60,000 inspections and issues 40,000 citations based on those inspections annually. Almost 92% of those citations are settled through negotiations.

- a. Penalty Amounts. As noted generally above, section 17(b) requires a penalty of up to \$1,000 for each "serious" violation. 29 U.S.C. § 666(b). The OSHA Field Operations Manual, Chapter VI(A)(1) requires such penalties to fall within the \$300 to \$1,000 range. Non-serious violations at the OSHA's option may be assessed fines for up to a \$1,000 penalty. 29 U.S.C. § 666(c). The Field Operations Manual Chapter VI(A)(2) suggests limiting any such penalties to less than \$300. Repeated or willful violations are subject to fines of up to \$10,000 per violation. 29 U.S.C. § 660(a).
- b. Calculation of Proposed Penalties. Similar to the EPA under 33 U.S.C. § 1319(g), the OSHA is statutorily required to consider certain modifying factors in assessing a civil penalty. Unlike the EPA under the CWA, however, the OSHA does not consider the economic benefit derived by the alleged violator in failing to enforce the relevant standard. 29 U.S.C. § 666(j). Also, the OSHA process is primarily based upon one factor -- the gravity of the violation. The remaining

factors only act to modify the initial determination. The four factors to be considered by the OSHA are as follows:

- i. Gravity of the Violation. The OSHA bases its determination primarily upon the seriousness of the violation. *See* OSHA Field Operations Manual, Chapter VI(A)(2)(d). The OSHA reviews two factors; the severity of illness or injury which could result from the violation; and the likelihood that illness or injury could result from the violation, including the number of employees exposed. *Id.* at VI(A)(2)(j).
 - ii. The remaining factors may reduce the initial penalty determination by up to 80% broken down as follows: a reduction of up to 40% based upon the size of the business, as measured by the number of employees controlled by the employer in all workplaces within a 12- month period, with no reduction for businesses with 100+ employees; a reduction of up to 30% permitted for the employer's good faith efforts to enforce safety and health programs prior to the inspection; and a reduction of up to 10% when the employer has no significant history of previous violations.
 - c. Review Commission Authority to Revise Assessments. Note that the Commission may increase or reduce the penalty proposed by the OSHA. 29 U.S.C. §§ 659(c), 666(j). *See also Clarkson Construction Co. v. OSHRC*, 531 F.2d 451 (10 Cir. 1976).
8. Criminal Penalties. Although rare, the OSHA may seek with the local United States attorney to bring an action in the U.S. District Court. *See, U.S. v. Elliot*, No. 89-4018 (D.S.D. September 1989), where the president of a heating and plumbing firm pled guilty to violation of the OSHA trenching standards which caused the death of two employees. He received a six-month sentence, an additional three years probation, and was also required to make restitution as a condition of receiving probation.

Section 17(e) of the Act states in relevant part as follows:

"any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both." 29 U.S.C. § 666(e).

False representations or filings may also provoke criminal proceedings. Section 17(g) of the Act makes it unlawful knowingly to make a "false statement, representation, or certification in any application, record, report, plan, or document filed or required to be maintained pursuant to this chapter." 29 U.S.C. § 666(g). Violators of this provision potentially face a fine of up to \$10,000 or imprisonment for up to six months, or both. *Id.*

Note, that malicious intent need not be proven -- only that the employer was aware of the relevant standards and chose not to comply with them. *United States v. Dye Construction Co.*, 510 F.2d 78 (10th Cir.).

Note also, that the OSHA may utilize the Criminal Fine Enforcement Act of 1984 which provides for increased fines of up to \$250,000 for individuals, and up to \$500,000 for corporations when either violates a criminal statute. 18 U.S.C. § 3623. Fortunately, the EPA, the MMS, and the U.S. Coast Guard have not yet similarly resorted to the Criminal Enforcement Act in their respective enforcement activities.

9. State Criminal Prosecution. The final question to consider is potential criminal prosecution by state authorities. What if the OSHA considers, but does not actually prosecute an individual under the above federal criminal statutory language. May state authorities then prosecute employers for work-related injuries or death under general state criminal statutes? Does the Act preempt such prosecution in states without the OSHA approved state enforcement plans? (See subsection 10 below; states may petition the OSHA for approval to take over the

OSHA's role in developing and enforcing occupational safety and health standards).

This is a hotly debated issue. However, state courts have split on the issue. Colorado and Texas courts have ruled that the OSHA preempts state prosecution in states without OSHA approved state plans. *Colorado v. Kelran Construction Co.*, 13 BNA OSHC 1898 (D. Colo. 1988); *Sabine Consolidated Inc. v. Texas*, 756 S.W.2d 865 (Tex. App. 1988).

On the other hand, Wisconsin, Illinois, and Michigan courts have ruled that the Act does preempt general state criminal laws. *Wisconsin ex rel. Cornellier v. Black*, 13 BNA OSHC 1761 (Wis. Ct. App. 1988); *Michigan v. Hegedus*, 14 BNA OSHC 1049 (1989); and *Illinois v. Chicago Magnet Wire Co.*, 534 N.E.2d 962, 13 BNA OSHC 2001 (Ill. 1987), *cert. den.* 58 U.S.L.W. 3213 (October 3, 1989).

The OCSLA, the CWA, etc. have similarly limited criminal enforcement schemes as the scheme in the Occupational Safety and Health Act which three states held did not preempt state criminal prosecution. This suggests that the safest course of advice for attorneys whose clients face potential criminal enforcement for OCS related activities, is that state authorities may still have the power independently of federal authorities to initiate criminal prosecutions for injuries or deaths arising as a result of those OCS related activities.

10. State Assumption of the OSHA's Role. Simply note that section 18(b) of the Act authorizes states to petition the OSHA and after meeting certain criteria, to assume the responsibility for the development and enforcement of occupational safety and health standards. 29 U.S.C. § 667(b). Almost one-half of the states have exercised this option. The OSHA continues to monitor state programs to ensure that the programs provide at least as rigorous protection as the federal OSHA standards. 29 U.S.C. § 667(e).

H. OPS Pipeline Enforcement Proceedings

1. Summary. The Director of OPS has a number of enforcement options at his disposal under the NGPSA and the HLPsA. First, as previously noted he may enter and inspect any regulated pipeline facility. 49 U.S.C. § 1680(b)(1) (Supp. III

1982); 49 App U.S.C. § 2010(c) (Supp. III 1982); and 49 C.F.R. § 190.203.

Upon discovery of a potential violation of the regulations promulgated under either the NGPSA or the HLPSA, the OPS may either issue a warning letter or issue a notice of probable violation (NOPV). 49 C.F.R. § 190.205. The NOPV letter may either contain a proposed civil penalty or a proposed compliance order, but not both. 49 C.F.R. § 190.223(d).

Also, the party has 30 days after the receipt of the NOPV letter in which to respond to the Region Chief of the OPS. 49 C.F.R. § 190.209. As for a proposed civil penalty, the party may either pay the penalty, submit a counteroffer amount, submit written materials which explain or mitigate the NOPV, or request a hearing. 49 C.F.R. § 190.209(a).

If the OPS seeks a compliance order, then the party may agree to the proposed order, seek a consent order, object in writing to the proposed order, or request a hearing. 49 C.F.R. § 190.209(b).

Similar to the OSHA notices, failure to respond constitutes a waiver of any right to contest an OPS allegation. 49 C.F.R. § 190.209(d).

2. Civil Penalties. An operator is subject under both the NGPSA and the HLPSA to a \$10,000 fine for each violation and for each day the violation exists up to a maximum fine of \$500,000. 49 U.S.C. § 1679a(a)(1) (Supp. III 1982) and 49 U.S.C. § 2007(a)(1) (Supp. III 1982). Similar to EPA enforcement under the CWA, the OPS in assessing the fine may consider

"the nature, circumstances, and gravity of the violation and, with respect to the person found to have committed the violation, the degree of culpability, any history of prior violations, the effect on ability to continue to do business, any good faith in attempting to achieve compliance, ability to pay the penalty, and such other matters as justice may require." 49 U.S.C. § 1679a(a)(3) and 49 U.S.C. § 2007(a)(2) (Supp. III 1982); 49 C.F.R. § 190.225. 3.

3. Compliance Order. The OPS may also issue an order requiring a party to cease and desist in conduct which involves a violation of the NGPSA or the HLPISA. 49 C.F.R. § 190.217.
4. Hazardous Facility Orders. 49 C.F.R. § 190.233. The OPS may administratively order corrective action or request the Attorney General to seek injunctive relief if he finds a particular pipeline facility to be hazardous either to life or property. *Id.* The HLPISA even contemplates the recovery of punitive damages. 49 U.S.C. § 2008(a)(1) (Supp. III 1982).
5. Citizen Suits. 49 U.S.C. §§ 1686 and 2014 (Supp. III 1982). Any person may sue with 60-day prior notice to the Secretary of DOT any other person who is alleged to be violating any term of the statute(s) or any order or regulation issued thereunder. *Id.*

I. Formal Agency Adjudications

1. Ex Parte Contacts. Remember that informal, ex parte contacts with administrative personnel involved in the decisionmaking process are forbidden by the APA once a hearing is scheduled. 5 U.S.C. §§ 557(a),(d)(1). (i.e., that is why it is best to seek agency assistance in an informal fashion where communications may flow freely between the MMS and interested parties). See *State of North Carolina v. EPA*, 881 F.2d 1250 (4th Cir. 1989), for an example of application of these provisions. See also, 43 C.F.R. § 4.27.
2. Scope of Review. Remember that in any appeal of an agency decision to a federal district court that the Court will usually limit its review of the decision to the materials that were presented to the agency below. So make sure that you present in the hearing before the agency everything that you want to preserve in the decision-making record.

XIX. The Agency Appeals Process

A. MMS Denial

Suppose an MMS officer denies your request for suspension of production or assesses additional OCS royalty payments. Suppose a U.S. Coast Guard Officer in Charge, Marine Inspection (OCMI), sites you for having improper safety flotation devices on an offshore facility. How do you appeal these decisions? However, prior to the filing of

any appeal, you should attempt to resolve the dispute directly with the relevant sub agency. Administrative appeals frequently languish for long periods of time within the agency appeals body. Thus, direct negotiations with the sub-agency often produce a faster and equally satisfying resolution of the issues in dispute.

B. MMS Appeals: A Two Step Process

1. First, you appeal the underlying MMS decision to the Director of the MMS. 30 C.F.R. Parts 243, 290 and 250.24.
2. If you are unsatisfied with the Director's decision, you may then appeal that decision to the Secretary of the Interior or his designated representative, the IBLA. 43 C.F.R. Part 4, Subparts A, B and E.

C. Appeals to the Director of the MMS

1. Royalty Management Program Regulations. 30 C.F.R. § 243.1 states that any appeal of an order or decision (other than penalty notices, *see*, Section D *infra*) issued under regulations administered by the Royalty Management Program may be appealed pursuant to Part 290.
2. Operating Regulations. 30 C.F.R. § 250.24 states that any appeal of an OCS order or decision under issued the Part 250 OCS operating regulations may be appealed pursuant to Part 290.
3. Effect of Appeal. Appeal of any order or decision does not suspend the requirement to comply with the order or decision. 30 C.F.R. §§ 243.2 and 250.24. The 1988 regulatory revisions clarify that under the Part 250 operating regulations only the Secretary or his delegate may authorize such a suspension. *Id.*
4. A Lessee may ask that the effect of a decision be suspended pending appeal. The Director of the MMS may authorize such suspension upon a finding that such suspension will not be detrimental to the lessor and upon submission of an indemnity bond. 30 C.F.R. § 243.2. *See also Marathon Oil Co.*, 90 IBLA 236 (1986).

In *Marathon*, the Interior Board of Land Appeals held that a Lessee must show the threat of irreparable injury in order to justify posting of a bond and suspending the effect of the order

or decision. The IBLA found, however, that the threat of lost interest on monies constituted the threat of irreparable injury. *Id.* at 246. Since the MMS does not grant interest on any royalty refund, theoretically, a Lessee can always demonstrate the threat of irreparable injury where the MMS order or decision includes a monetary assessment.

5. Proposed Revisions - Royalty Management Program Appeals. The above procedure can generate lots of unnecessary paperwork. For that reason, the MMS has proposed to suspend the effectiveness of basically any MMS decision which calls for payment of bonuses, rentals, royalties, etc. 55 Fed Reg 6401 (February 23, 1990); 55 Fed. Reg. 12,386 (April 3, 1990). The suspension would be qualified upon submission of a surety in an amount sufficient to cover the amount in dispute, plus interest on that sum for one year. 30 C.F.R. §§ 243.2(a) and (c).

Failure to post surety would result in dismissal of the appeal. 30 C.F.R. § 243.2(d).

Note that appeals from the MMS decisions relating to operating regulations are unaffected by this proposed revision.

Exhaustion of Administrative Remedies. 30 C.F.R. § 243.3. The MMS proposes to clarify that an appellant must appeal a decision of an underlying MMS officer to the Director of the MMS, and then to the IBLA, unless the Director has otherwise indicated the decision to be final. *Id.*

6. Appeals Procedure for the MMS Decisions. 30 C.F.R. Part 290.
 - a. Summary. As compared to the rules governing state or federal court litigation the procedure for appealing the decision of an MMS official is relatively informal, with one exception.
 - b. Scope. The procedures are applicable to appeals to the Director of the MMS from final orders or decisions of officers of the MMS issued under Chapter II of Title 30 (Chapter II includes all of Parts 201-270), and some other unrelated MMS areas of authority. 30 C.F.R. § 290.1.1 (Note: The case process and appeals procedure of the MMS civil penalty notices for Lessees'

violations of the MMS operating regulations is handled separately under 30 C.F.R. § 250.200 and is described in Part D *infra*.)

- c. Who may appeal? Any party to a case adversely affected by a decision of the MMS, unless of officers of the MMS issued under Chapter II of Title 30 (Chapter II includes all of Parts 201-270), and some other unrelated MMS areas of authority. 30 C.F.R. § 290.1.1 (Note: The case process and appeals procedure of the MMS civil penalty notices for Lessees' violations of the MMS operating regulations is handled separately under 30 C.F.R. § 250.200 and is described in Part D *infra*.)
- c. Who may appeal? Any party to a case adversely affected by a decision of the MMS, *unless* the decision was approved by the Secretary of Interior or Director of the MMS prior to promulgation. 30 C.F.R. § 290.2.
- d. Technical Requirements. You *must* begin an appeal by filing a notice of appeal with the official who issued the decision, *within 30 days* from service of the order or decision. There are *no* exceptions. *Pennzoil Oil & Gas, Inc.*, 61 IBLA 308 (1982).

You may send written arguments or supporting materials to the official within the same 30-day period. 30 C.F.R. § 290.3.d. However, the Director of the MMS may extend the time period for filing supporting documents. 30 C.F.R. § 290.4.

- e. Oral argument may be allowed in the discretion of such officer. 30 C.F.R. § 290.4.
- f. If you are a party to a case and are dissatisfied with the decision of the Director of the MMS, you have the right to appeal the Director's decision to the IBLA. 30 C.F.R. § 290.7.

D. Penalty Notices for Violations of MMS Operating Regulations: 30 C.F.R. § 250.200

- 1. As noted in subsection C above, the MMS has the power to assess, collect and compromise civil penalties for failure of any person to "comply with any provision of [the OCSLA, as

amended], or any term of a lease, license, or permit issued pursuant to this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action" No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing." 43 U.S.C. § 1350(b).

2. Usually, the procedure begins with an MMS inspection of an offshore facility. The MMS inspector will issue the Lessee or permittee a notice of violation and require the Lessee or permittee to correct the cited violation. If the Lessee or permittee fails to correct the violation within the prescribed time, then the MMS may implement a civil penalty action under Part 200. *See also*, 30 C.F.R. § 241.20.

E. Violation of the EPA NPDES Discharge Permits

Note that under a MOU dated May 31, 1984, the EPA gave the MMS the power to monitor, inspect, and take samples at OCS facilities to determine compliance with the NPDES permits issued under the CWA. The EPA, however, retained the power to analyze any samples taken and to enforce compliance with the relevant NPDES permit conditions. Unlike the much broader August 29, 1989, MMS/U.S. Coast Guard MOU which allocates agency jurisdiction over various issues, the MMS/EPA MOU relates only to the MMS assisting the EPA in gathering data and information so that the EPA may carry out its mandate. See Article XVIII.F. *supra* for a discussion of the EPA enforcement process.

F. Appeals of MMS Decisions to the Interior Board of Land Appeals

1. **Structure.** The Office of Hearings and Appeals (OHA) consists of four appeals boards, one of which is the IBLA. 43 C.F.R. § 4.1.
2. **Purpose.** The OHA functions as an authorized representative of the Secretary of Interior, and has full and final decision-making authority as if it were the Secretary. *Id.*
3. **The IBLA Authority and Scope of Review.** The IBLA has the OHA's final decision making authority on decisions rendered by the DOI officials relating *inter alia* to public lands, acquired lands, and submerged lands on the OCS. 43 C.F.R. § 4.1(b)(3). Moreover, the IBLA exercises the *de novo* review authority of the Secretary on all matters within its jurisdiction.

See, Exxon Co. USA, 15 IBLA 345 (1974). Unlike a court, the IBLA's role and the appellants' rights vary depending upon the nature of the previous proceedings and the applicable substantive law.

4. The Secretary may intervene at any time in a case before the IBLA and render a final decision himself. 43 C.F.R. § 4.5(a)(1). This is a favorite tactic of the MMS if it feels the IBLA may rule adversely against the agency.
5. Filing of Appeal. Generally, timely filing of an appeal suspends the effect of an MMS decision. 43 C.F.R. § 4.21(a). *However*, orders issued by the MMS under the Royalty Management Program currently are *not* suspended by filing a timely notice of appeal to the IBLA, unless the Director of the MMS in his discretion finds that such suspension will not be detrimental to the lessor-MMS. 30 C.F.R. § 243.2. See discussion of *Marathon Oil Co.* at Section XIX C.4. *supra* on how 30 C.F.R. § 243.2 has been interpreted.
6. Rules Governing Appeals. Subparts A and B of Part 4 create rules generally applicable to appeals before any board of the OHA. Subparts C through L create special rules applicable to specific Appeals Boards within the OHA.

Wherever the general OHA rules conflict with special rules applicable to an Appeals Board, the special rules will govern. 43 C.F.R. § 4.1(b).

G. Specific Rules Applicable to Appeals before the IBLA: 43 C.F.R. Subpart E

1. Jurisdiction. Strangely, 43 C.F.R. § 4.1(b)(3) states that the IBLA has jurisdiction over all matters affecting the use and disposition of public lands on the OCS, but then 43 C.F.R. § 4.410 states only that appeals from the BLM decisions are considered under Subpart E. The DOI should amend 43 C.F.R. §§ 4.400 (c) and 4.410(a) to correct the oversight of excluding OCS related decisions by the MMS. Subpart E.
2. How to Appeal. A person adversely affected by a decision of an officer of the BLM or the MMS must file his appeal in the office of the BLM or the MMS officer who rendered the decision. If the initial decision does not specify the facts and law upon which the decision relied, the appellant should seek

to have the initial decision stayed or withdrawn pending clarification so that the period for appeal does not run while waiting.

Otherwise, the appeal must be filed within 30 days after the person has been served with the adverse decision or else no appeal will be allowed. 43 C.F.R. § 4.411(a).

3. **Late Filing.** There is a short 10-day grace period for late filings if the officer determines that the appeals document was probably transmitted prior to the end of the 30-day filing period and just arrived at the BLM or the MMS office late. 43 C.F.R. § 4.401(a).
4. **Arguments.** A statement of reasons may accompany the notice of appeal. Otherwise, a person may file a statement of reasons 30 days after the notice of appeal was filed. Note, that if you did not send your supporting documents along with the Notice of Appeal, then such supporting documents should be sent directly to the IBLA. 43 C.F.R. § 4.412. Note, that an appellant may ask the IBLA to limit disclosure of confidential information which the appellant submits in a proceeding. 43 C.F.R. § 4.31.
5. **Hearings.** Hearings required by statute or regulation usually occur *before* a matter reaches the IBLA. However, an appellant or adverse party may always ask the IBLA to remand a case to an administrative law judge for a hearing to present evidence and to resolve questions of fact. 43 C.F.R. § 4.415. Appellants have the burden of demonstrating to the IBLA that a material issue of fact exists. *Burton/Hawks Inc. v. United States*, 553 F. Supp. 86, 92 (D. Utah 1982). In fact, request a hearing if facts are in issue. Even if the hearing is not granted, it preserves your record for judicial review. *Id.*
6. **Discovery.** There are no clear rules for discovery before the IBLA of documents or evidence outside the case files. A FOIA request seems to be the least trouble and expense in most cases. Also, make a record of any agency failure to provide information or documents bearing on any matter.
7. **Oral Argument.** The IBLA may grant a request for oral argument, although it rarely does so. 43 C.F.R. § 4.25.

8. Petitions for Reconsideration of the IBLA Decisions and Judicial Review.

- a. The IBLA Reconsideration. There is no set time limit for filing a petition; however it must be filed "promptly". 43 C.F.R. § 4.21(c). See, *Pathfinder Mines Corp.*, 76 IBLA 276(1983).
- b. Judicial Review. Please note, the recent case of *Geosearch Inc. v. Hodel*, 801 F.2d 1250, (10th Cir. 1988). In that case, the 10th Circuit held that petitioning the IBLA for reconsideration of a decision does not stay the 90-day appeal period under the Mineral Leasing Act for filing actions to review decisions of the Secretary. 30 U.S.C. § § 226-2, also citing 43 C.F.R. § 4.21(c). See also, *King v. Udall*, 266 F. Supp. 747 (D. D.C. 1967).

While Section 23 of the OCSLA, as amended, does not contain a similar limitation, be careful not to tarry too long in seeking judicial review of an IBLA decision. 43 U.S.C. § 1349(b).

H. The U.S. Coast Guard Appeals Process

1. The U.S. Coast Guard recently consolidated all of its appeal processes for appeal of any U.S. Coast Guard action or decision, with the exception of suspension and revocation hearings, into a single appeals process. 46 C.F.R. Subpart 1.03 Rights-of- Appeal. 54 Fed. Reg. 50,374 (Dec. 6, 1989); correction 55 Fed. Reg. 21,386 (May 24, 1990). The new appeals process is simple and similar to the MMS appeals process in many ways.
2. The general rules applicable to a U.S. Coast Guard appeal appear at 46 C.F.R. § 1.03-15. First, a request for review must be made within 30 days of the date that the decision was rendered or action taken. *Id.* Initial appeal should be to the individual who rendered the decision. If unsatisfied, one may then make a formal appeal to the relevant District Commander or the Commandant as noted in subsection 3 below.

The formal appeal must be in writing and submitted to the relevant officer within 30 days of the decision or action being appealed. 46 C.F.R. § 1.03-15(c). Unlike the MMS, upon

written request and for good cause, the U.S. Coast Guard will extend the appeals deadline for a formal appeal. *Id.*

The appeal must contain a description of the decision or action being appealed, and why the decision or action should be set aside. 46 C.F.R. § 1.03-15(d).

The decision is effective pending appeal, although the appellant may petition the Commandant or District Commander to stay the effect of the decision or action pending appeal. 46 C.F.R. §§ 1.03-15(e) and (f).

3. **To Whom You Appeal.** Formal appeal of the decision of an OCMI should be made to the District Commander in whose District the OCMI is located.

Formal appeal of a decision or action of a District Commander should be made to the Commandant of the U.S. Coast Guard. 46 C.F.R. § 1.25. 46 C.F.R. § 120.

Finally, failure properly to submit a formal appeal in accordance with the time limits and procedure of subpart 1.03 results in the relevant decision becoming final agency action. 46 C.F.R. § 1.03-15(i).

XX. Conclusion Or Why Much of the Above May Be Irrelevant

We previously mentioned the power of the local MMS District Supervisors to alter well-related regulatory requirements. *See* preamble to Article XII. However, the full range of operating requirements contained in 30 C.F.R. Part 250 is subject to what the author calls the Running Man "anything goes" caveat which appears at 30 C.F.R. § 250.3(b):

The appropriate MMS official may prescribe or approve departures from the operating requirements of the regulations of this part when such departures are necessary for the proper control of a well, the . . . proper development of a lease, the conservation of natural resources, the protection of life . . . , property, or the . . . environment.

While the MMS interpretation of the terms "operating requirements" and the "appropriate MMS official" will affect the amount of flexibility injected into its management of OCS operations, the provisions of 30 C.F.R. § 250.3 nonetheless give an imaginative attorney the tools necessary to sculpt the operating requirements to each client's particular situation.

APPENDICES

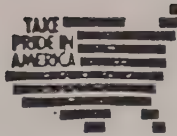
Various source documents which are referenced in the body of the Manual are reproduced here for the reader's convenience.

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| Minerals Management Service, Gulf of Mexico Region, Letters to Lessees dated October 12, 1988, September 5, 1989, and September 27, 1989, for Plans of Operations and Development Operations and Coordination Documents filed for OCS leases located in the Gulf of Mexico. | |
| APPENDIX B: | 261 |
| Memorandum of Agreement Between the EPA and the Department of the Army Concerning the Determination of Mitigation under the CWA Section 404(b)(1) Guidelines. | |
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| List of Reportable Quantities of Hazardous Substances Used in OCS Operations. | |
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| Unpublished Internal Memorandum dated November 6, 1989, from the Associate Director for Offshore Minerals Management to the Regional Director, Gulf of Mexico OCS Region, entitled "Responsibility of Assignors and Assignees" | |



United States Department of the Interior

MINERALS MANAGEMENT SERVICE
GULF OF MEXICO OCS REGION
1201 ELMWOOD PARK BOULEVARD
NEW ORLEANS, LOUISIANA 70123-2394



In Reply Refer To: FO-2-1

SEP 05 1989

Gentlemen:

Our Letter to Lessees (LTL) dated October 12, 1988, lists the information required for Plans of Exploration (POE) and Development Operations Coordination Documents (DOCD). The purpose of this letter is to modify and clarify some of those requirements.

The aforementioned LTL states that revised and supplemental plans need contain only that information related to or affected by the revisions proposed in those plans. Such a limitation of the information allowed for revised and supplemental plans is hereby modified to no longer exclude the oil spill related information identified in Items Nos. 4(b) of the LTL for both POE's and DOCD's. Therefore, effective immediately, all plans regardless of type (initial, supplemental, and revised) shall contain all of the information required by Items Nos. 4(b) for both POE's and DOCD's.

Items Nos. 4(b)(2) require an estimation of the time for the mobilization, transportation, and onsite deployment of oil spill response equipment and materials. Items Nos. 4(b)(2) are hereby modified to read "an estimation of the individual times for procurement of the equipment, equipment transportation vessel, and the personnel to load and operate the equipment; equipment load-out; travel to the deployment site; and equipment deployment."

Procurement time is defined as the time required after the discovery of an oil spill to assemble the equipment, the equipment transportation vessel, and the equipment load-out and operating personnel at the base from which the vessel when loaded will depart for direct travel to the deployment site. The procurement time shall be accompanied by a listing of the estimated times required to accomplish each of the three above-referenced tasks. Procurement time shall also be accompanied by an identification of the location of this base if it is different than the primary location of equipment referenced in Items Nos. 4(b)(1) of the LTL. If a lessee is not a member of an industry cooperative such as Clean Gulf Associates, the time required to complete contractual agreements regarding the procurement of equipment and materials shall be considered in estimating procurement time.

Equipment load-out time is generally defined as the time required to transfer the equipment to the transportation vessel. Specifically, this time period shall begin with the end of the previously defined procurement time and end with the departure of the vessel from the aforementioned base to the deployment site.

Travel time to the deployment site shall begin with the end of the previously defined load-out time and end with the arrival of the vessel at the deployment site, and shall be accompanied by the vessel speed that was used in estimating the travel time. In estimating the travel time and the procurement time, any inlet water travel which might necessitate reduced travel speed shall be considered.

Equipment deployment time is defined as the time period beginning with the arrival of the vessel at the deployment site and ending with the initiation of actual equipment operation.

The total response time is therefore the sum of the four above-referenced individual times and shall essentially represent your estimation of the response time that can reasonably be expected in the event of an oil spill. It is recognized, however, that unforeseen circumstances at the time of a spill could possibly result in a response time being either less or greater than that estimated in a POE or DOCD.

Items Nos. 8 require for POE's and DOCD's a discussion of the measures that have been or will be taken to satisfy the requirements of 30 CFR 250.67(c) regarding hydrogen sulfide (H_2S) area classification and contingency plans. This regulation states in part that prior to beginning operations in an area, the lessee shall request a determination as to whether the proposed operations will be in areas classified as "Zones known to contain H_2S ," "Zones where the presence of H_2S is unknown," or "Zones where the absence of H_2S has been confirmed," and that the request be supported by a recommendation of one of the three classifications. Henceforth, in order to satisfy the provisions of Items Nos. 8, each POE and DOCD shall contain for each well a request for such a determination as quoted, a recommendation for one of the three classifications, and a discussion of the basis for the recommendation.

Sincerely yours,

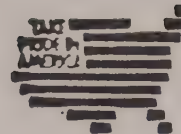


J. Rogers Percy
Regional Director



United States Department of the Interior

MINERALS MANAGEMENT SERVICE
GULF OF MEXICO OCS REGION
1201 ELMWOOD PARK BOULEVARD
NEW ORLEANS, LOUISIANA 70123-2394



A

In Reply Refer To: FO-2-1

SEP 27 1989

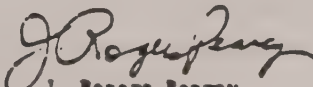
Gentlemen:

In accordance with 15 CFR 930.78(b) and 15 CFR 930.84(a), a State coastal zone management (CZM) agency is required to ensure timely public notice of the receipt of each OCS plan which has been submitted to them for their CZM consistency determination. In order to comply with this requirement, the State of Louisiana, on August 29, 1983, issued a special announcement which requires that the applicant ensure publication of the notice of receipt in the official journal of the State of Louisiana, the State Times, for each individual exploration plan (POE) which proposes activities that may affect any land or water use in the coastal zone of the State of Louisiana. Applicants are not required to provide the public notice for development operations coordination documents (DOCD) since the State of Louisiana determined that the notice of receipt of a DOCD that the Minerals Management Service (MMS) publishes in the Federal Register would serve that purpose.

However, the revised Federal regulations (30 CFR 250.34) which became effective May 31, 1988, no longer require the MMS to publish this notice for DOCD's. The MMS, therefore, informed the State of Louisiana that effective October 1, 1989, we would no longer make such publications. Given these circumstances, the State of Louisiana has issued a revised special announcement which now requires the applicants to ensure publication of a public notice for those POE's and DOCD's for which a CZM consistency determination is required [see Notice to Lessees and Operators (NTL) No. 86-09, Section I.A]. A copy of this special announcement is enclosed as Enclosure No. 1. Please be advised that this special announcement not only requires publication in the State Times but also now requires publication in the official journal of the parish(es) most likely to be affected by the proposed activities. Moreover, the operator is now required to certify in the certificate of coastal zone consistency accompanying each OCS plan as required by Items Nos. 9 of the supporting information required by our October 12, 1988, Letter to Lessees and Operators, that arrangements have been made to make both of these publications and to provide a copy in the OCS plan of the notice that will be published. The format to be used for the certificates of coastal zone consistency is to approximate that given in Enclosure No. 2.

This letter supersedes our letter dated September 2, 1983, on this subject and amends portions of Section III and guidelines Section IV.B of NTL No. 86-09, dated October 13, 1986.

Sincerely,

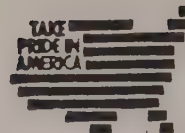

J. Rogers Percy
Regional Director

Enclosures



United States Department of the Interior

MINERALS MANAGEMENT SERVICE
SOUTHERN ADMINISTRATIVE SERVICE CENTER
1201 ELMWOOD PARK BOULEVARD
NEW ORLEANS, LOUISIANA 70123-2394



OCT 12 1988

In Reply Refer To: FO-2

Gentlemen:

Pursuant to the final rules 30 CFR 250.33(d) and 250.34(e), published in the Federal Register, April 1, 1988, (53 FR 10595), the amount of information to be included in Exploration Plans (POE), Development and Production Plans (POD/P), and Development Operations Coordination Documents (DOCD) for leases in the Gulf of Mexico (GOM) Outer Continental Shelf (OCS) Region may be limited by the Regional Director to that which is necessary to ensure compliance with the OCS Lands Act, as amended, other laws, applicable regulations, and lease provisions.

After consultation with the Governor of each affected State, the Coastal Zone Management Agency of each affected State, and the Office of Ocean and Coastal Resource Management, it has been determined that effective October 24, 1988, the amount of information required for Initial POE's and DOCD's for oil and gas leases in the GOM OCS Region may be limited to the following:

POE

CONTENTS

1. A complete description of the proposed exploration activities to be undertaken including a tentative schedule of their performance from commencement to completion.
2. A brief description of the type of drilling unit to be used including a discussion of its important safety and pollution-prevention features.
3. A table indicating the surface location (SL), bottom-hole location (BHL), true vertical depth (TVD), and water depth for each proposed well. (The BHL's and TVD's may be omitted from public information copies of the plan.)

SUPPORTING INFORMATION

1. A current structure map (8 1/2" x 11") drawn to the top of each prospective hydrocarbon accumulation showing the SL and BHL of each proposed well. (This map may be omitted from public information copies of the plan.)

2. A bathymetry map (8 1/2" x 11") showing the SL of each proposed well.

3. An analysis of any seafloor and subsurface geologic and manmade features and conditions which may have an adverse effect on the proposed operations. The analysis shall adhere to the provisions of paragraph II.A. of Notice to Lessees (NTL) No. 83-3.

4. (a) A site-specific Oil Spill Contingency Plan (OSCP) as described in 30 CFR 250.42 or

(b) A brief description of your approved regional OSCP for the GOM that includes, as it pertains to the proposed operations, (1) identification of the primary location of containment and removal equipment, (2) an estimation of the time required for mobilization, transportation, and deployment onsite of the equipment and materials, and (3) a discussion which identifies the zone(s) that appropriate and available trajectory analyses indicate may be impacted by an oil spill, the environmentally sensitive resources and areas within the impact zone(s), and the strategies to be used to protect these resources from oil spills. In the discussion, identify the specific source documents which were used to determine the impact zone(s), the environmentally sensitive resources and areas that could be affected, and the oil spill response strategies.

5. A discussion of any new or unusual technology to be employed. This discussion may be omitted from public information copies of the plan. (For ROE's that are subject to CZM consistency requirements, this information will be provided when complying with the requirements of Item No. 11 below and therefore need not be provided here.)

6. A discussion of the measures that have been or will be taken to satisfy the requirements of applicable operational lease stipulations.

7. A discussion of the quantity, rates of discharge, and composition of solid and liquid wastes and pollutants likely to be generated by onshore and offshore activities and transportation operations (including, but not limited to, drilling muds and cuttings, sewage, and chemicals); the basis for determining the composition, quantities, and rates of discharge of pollutants; and plans for treating, storing, transporting, and disposing of such wastes and pollutants. (For POE's in the Eastern GOM, this information will be provided when complying with the requirements of Item No. 11 below and therefore need not be provided here.)

8. A discussion of the measures that have been or will be taken to satisfy the requirements of 30 CFR 250.67(c) regarding hydrogen sulfide (H₂S) area classification and contingency plans.

9. Certificate(s) of coastal zone consistency, as required by 15 CFR 930 and discussed in Sections III and IV of Notice to Lessees and Operators (NTL) No. 86-09, prepared in the format prescribed in Section IV of the enclosure to NTL No. 86-09.

10. For each OCS facility, as defined in 30 CFR 250.44 the information described below:

(a) A list showing the projected emissions of sulphur dioxide (SO_2), total suspended particulates (TSP), nitrogen oxides (NO_x), carbon monoxide (CO), and volatile organic compounds (VOC). The list shall include all projected emissions from each source and from each OCS facility expressed in pounds per day and in tons per year for each year of operation and the basis for all calculations. A schematic drawing which identifies the location and elevation of each source on each OCS facility shall also be included.

(b) If projected emissions are based on the use of emission control technology, information on the source, the technology applied, the reduction achieved, and the proposed monitoring system to be used to measure emissions shall be provided. The basis for all calculations shall be shown.

(c) If the projected emissions of any of the air pollutants is greater than the emission exemption rate as defined in 30 CFR 250.45(d), the information required by 30 CFR 250.45(e) through (i) shall be provided.

11. Environmental information, as discussed in Sections I, II, and IV of NTL No. 86-09, prepared in accordance with guidelines in Sections II.A, II.B, or III of the enclosure to NTL No. 86-09. This environmental information should be provided in a separate volume. (Please note that the term "environmental report" as used in NTL No. 86-09 is synonymous with the "environmental information" required by this paragraph.)

12. A brief description of the onshore base to be used to support the exploration activities including information as to whether the facilities at the base are existing, proposed, or are to be expanded; a brief description of support vessels to be used and information concerning their frequency of travel; and a map showing the lease relative to the shoreline which depicts proposed transportation routes. (This information is required only to the extent that it is not provided when complying with the requirements of Item No. 11 above.)

13. When any well or associated anchoring locations are proposed in water depths greater than 400 meters; an analysis of the evidence and consequences of geological phenomena (such as hydrocarbon charged sediments, seismic wipe-out zones, anomalous mounds or knolls, gas vents, or oil seeps) that could support chemosynthetic organisms.

14. During the review of a POE, the submittal of copies of Common Depth Point (CDP) seismic lines near proposed well locations may be required.

15. The name, address, and telephone number of an authorized representative of the lessee to whom inquiries may be made.

DOCD

CONTENTS

1. A complete description of the proposed development activities to be undertaken including a schedule of the dates and sequences for drilling wells and installing facilities.
2. A brief description of the type of drilling unit that may be used and a description of any proposed facilities and operations that are directly related to the proposed development including a discussion of important safety, pollution prevention, and environmental monitoring features.
3. A table indicating the SL, BHL, TVD, and water depth for each proposed well. (The BHL's and TVD's may be omitted from public information copies of the plan.)

SUPPORTING INFORMATION

1. A current structure map (8 1/2" x 11") of the expected productive formations showing the SL and BHL of each proposed well. (This may be omitted from public information copies of the plan.)
2. A bathymetry map (8 1/2" x 11") showing the SL of each proposed fixed structure and well.
3. An analysis of any seafloor and subsurface geologic and manmade features and conditions which may have an adverse effect on the proposed operations. The analysis shall adhere to the provisions of paragraph II.A. of NTL No. 83-3.
4. (a) A site-specific OSCP as described in 30 CFR 250.42 or
 (b) A brief description of your approved regional OSCP for the GOM that includes, as it pertains to the proposed operations, (1) identification of the primary location of containment and removal equipment, (2) an estimation of the time required for mobilization, transportation, and deployment onsite of the equipment and materials, and (3) a discussion which identifies the zone(s) that appropriate and available trajectory analyses indicate may be impacted by an oil spill, the environmentally sensitive resources and areas within the impact zone(s), and the strategies to be used to protect these resources from oil spills. In the discussion, identify the specific source documents which were used to determine the impact zone(s), the environmentally sensitive resources and areas that could be affected, and the oil spill response strategies.
5. A discussion of any new or unusual technology to be employed. This discussion may be omitted from public information copies of the plan. (For DOCD's that are subject to CZM consistency requirements, this information will be provided when complying with the requirements of Item No. 11 below and therefore need not be provided here.)

6. A discussion of the measures that have been or will be taken to satisfy the requirements of applicable operational lease stipulations.

7. A discussion of the quantity, rates of discharge, and composition of solid and liquid wastes and pollutants likely to be generated by onshore and offshore activities and transportation operations (including, but not limited to, drilling muds and cuttings, produced water, sewage, and chemicals); the basis for determining the composition, quantities, and rates of discharge of pollutants; and plans for treating, storing, transporting, and disposing of such wastes and pollutants.

8. A discussion of the measures that have been or will be taken to satisfy the requirements of 30 CFR 250.67(c) regarding H₂S area classification and contingency plans.

9. Certificate(s) of coastal zone consistency, as required by 15 CFR 930 and discussed in Sections III and IV of No. 86-09, prepared in the format prescribed in Section IV of the enclosure to NTL No. 86-09.

10. For each OCS facility, as defined in 30 CFR 250.44 the information described below:

(a) A list showing the projected emissions of SO₂, TSP, NO_x, CO, and VOC. The list shall include all projected emissions from each source and from each OCS facility expressed in pounds per day and in tons per year for each year of operation and the basis for all calculations. A schematic drawing which identifies the location and elevation of each source on each OCS facility shall also be included.

(b) If projected emissions are based on the use of emission control technology, information on the source, the technology applied, the reduction achieved, and the proposed monitoring system to be used to measure emissions shall be provided. The basis for all calculations shall be shown.

(c) If the projected emission of any of the air pollutants is greater than the emission exemption rate as defined in 30 CFR 250.45(d), the information required by 30 CFR 250.45(e) through (i) shall be provided.

11. Environmental information, as discussed in Sections I, II, and IV of NTL No. 86-09, prepared in accordance with guidelines in Sections II.A, II.B, or III of the enclosure to NTL No. 86-09. This environmental information should be provided in a separate volume. (Please note that the term "environmental report" as used in NTL No. 86-09 is synonymous with the "environmental information" required by this paragraph.)

12. A brief description of the onshore base to be used to support the development activities including information as to whether the facilities at the base are existing, proposed, or are to be expanded; a brief description of support vessels to be used and information concerning their frequency of travel; and a map showing the lease relative to the shoreline which depicts proposed

transportation routes. (This information is required only to the extent that it is not provided when complying with the requirements of Item No. 11 above.)

13. When any well or associated anchoring locations are proposed in water depths greater than 400 meters, an analysis of the evidence and consequences of geological phenomena (such as hydrocarbon charged sediments, seismic wipe-out zones, anomalous mounds or knolls, gas vents, or oil seeps) that could support chemosynthetic organisms.

14. During the review of a DOCD, the submittal of copies of CDP seismic lines near proposed well locations may be required.

15. The name, address, and telephone number of an authorized representative of the lessee to whom inquiries may be made.

In accordance with 30 CFR 250.33(n)(2) and 250.34(q)(2), the GOM OCS Region has determined that there are three types of revisions to POE's or DOCD's. A Revised Plan is a revision to an approved plan that proposes changes such as those in the location of a well or platform, type of drilling unit, or location of the onshore support base. A Supplemental Plan is a revision to an approved plan that proposes the addition of an activity that requires a permit. An Amended Plan is any revision to a pending plan. Each of these types of plans need contain only that information related to or affected by the proposed revision. However, the description of the proposed revision must be complete and include rationale for the proposed changes as they relate to the approved or pending plan.

In the GOM OCS Region, POD/P's are required only for development and production operations on leases in the Eastern Gulf of Mexico. The requirements for POD/P's will be determined at a future date.

It has been determined that the number of copies required for both Initial and Supplemental POE's and DOCD's for leases in the GOM OCS Region shall be as follows:

1. Plans which describe activities on leases and unit areas on the OCS which affect the State of Florida (22 copies - 5 Proprietary and 17 Public Information).

2. Plans which describe activities on leases and unit areas on the OCS which affect the State of Alabama (10 copies - 5 Proprietary and 5 Public Information).

3. Plans which describe activities on leases and unit areas on the OCS which affect the State of Mississippi (11 copies - 5 Proprietary and 6 Public Information).

4. Plans which describe activities on leases and unit areas on the OCS which affect the State of Mississippi that are exempted from Coastal Zone Management (CZM) certification requirements (9 copies - 5 Proprietary and 4 Public Information).

5. Plans which describe activities on leases and unit areas on the OCS which affect the State of Louisiana (9 copies - 5 Proprietary and 4 Public Information).

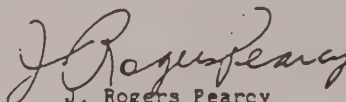
6. Plans which describe activities on leases and unit areas on the OCS which affect the State of Louisiana that are exempted from CZM certification requirements (8 copies - 5 Proprietary and 3 Public Information).

7. Plans which describe activities on leases and unit areas on the OCS adjacent to the State of Texas (9 copies - 5 Proprietary and 4 Public Information).

Seven copies of all Revised or Amended Plans (5 Proprietary and 2 Public Information) will be required.

All previous directives in correspondence, including HTL No. 84-1, regarding the content and the number of copies of plans, are hereby superseded.

Sincerely yours,


J. Rogers Percy
Regional Director



**MEMORANDUM OF AGREEMENT
BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY
AND THE DEPARTMENT OF THE ARMY CONCERNING
THE DETERMINATION OF MITIGATION UNDER THE
CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES**



I. Purpose

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide clarification for agency field personnel on the type and level of mitigation required to demonstrate compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))¹. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA is a directive for Corps and EPA personnel and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

¹Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

II. Policy

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.² The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation shall be based on the values and functions of the aquatic resource that will be impacted. This determination shall not be based upon characteristics of the proposed project such as need, societal value, or the nature or investment objectives of the project's sponsor. "Practicable" shall be defined as in Section 230.10(a)(2) of the Guidelines. However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. Notwithstanding this procedural approach, the Corps will, except as indicated below, first make a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be

²(except where Section 404(b)(2) applies).

mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, only as a last resort, compensate for aquatic resource values. This sequence will be considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of this MOA, as set forth at Section II.B (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). In some circumstances, it may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain. This environmental gain must be solely attributable to the project itself, exclusive of benefits which may accrue from proposed compensatory mitigation.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**³ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁴ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that, to be permissible, an alternative must be the least environmentally damaging practicable alternative. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁵ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

2. **Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit

³Avoidance as used in this MOA does not include compensatory mitigation.

⁴It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁵Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

3. Compensatory Mitigation. Appropriate and practicable compensatory mitigation will be required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. In most cases, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects will be considered as meeting the requirements of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. Other Procedures

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines

requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation will provide, at a minimum, one for one functional replacement (i.e., no net loss of values)⁶, with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be relevant in some cases, as discussed in Section II.B of this MOA.

C. The Guidelines are established as the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals. Other reviews, such as NEPA and the Corps public interest review, cannot be used to nullify any Guidelines requirements or to justify less rigorous Guidelines evaluations.

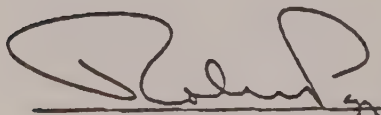
D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

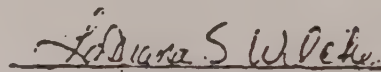
⁶In most cases a minimum of 1 to 1 acreage replacement of wetlands will be required to achieve no net loss of values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect thirty (30) days after the date of the last signature below, and will apply to those completed standard permit applications which are received on or after the effective date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

 11/14/89
Robert W. Page (date)
Assistant Secretary of the Army
(Civil Works)

 NOV
LaJuana S. Wilcher (date)
Assistant Administrator for Water
U.S. Environmental Protection Agency



Reportable Quantities of Hazardous Substances Potentially Used in AOGC

| | | | |
|--------------------------|---------|-----------------------------|---------|
| Acetic Acid | 5000 lb | Hydrogen Sulfide | 100 lb |
| Acetone | 5000 lb | Isobutyl Alcohol | 5000 lb |
| Acrylamide | 5000 lb | Methanol | 5000 lb |
| Ammonia | 100 lb | Methyl Ethyl Ketone | 5000 lb |
| Ammonium Bicarbonate | 5000 lb | Monoethylamine | 100 lb |
| Ammonium Bifluoride | 100 lb | Methylene Chloride | 1000 lb |
| Ammonium Bisulfite | 5000 lb | Methyl Chloride | 1 lb |
| Ammonium Hydroxide | 1000 lb | Methyl Mercaptan | 100 lb |
| Asbestos | 1 lb | Naphthalene | 100 lb |
| Benzene | 1000 lb | Pentachlorophenol | 10 lb |
| 1-Butanol | 5000 lb | Pesticides: Malathion | 100 lb |
| Captan | 10 lb | Diazinon | 1 lb |
| Carbon Disulfide | 100 lb | Phenol | 1000 lb |
| Carbon Tetrachloride | 5000 lb | Phosphoric Acid | 5000 lb |
| Chlorine | 10 lb | Potassium Hydroxide | 1000 lb |
| 2-Chlorophenol | 100 lb | Potassium Permanganate | 100 lb |
| Chlorinated Hydrocarbons | 1 lb | Pyrethrine | 1 lb |
| Chloroform | 5000 lb | Sodium Bisulfite | 5000 lb |
| Chromic Acid | 1000 lb | Sodium Chromate | 1000 lb |
| Chromium | 1 lb | Sodium Hydroxide | 1000 lb |
| 1,1-Dichloroethylene | 5000 lb | Sodium Hypochlorite | 100 lb |
| Dibutyl Phthalate | 10 lb | Sodium Nitrite | 100 lb |
| Ethylene Dichloride | 5000 lb | Sodium Phosphate (Di basic) | 5000 lb |
| Ethyl Acetate | 5000 lb | Sulfuric Acid | 1000 lb |
| Formaldehyde | 1000 lb | Toluene | 1000 lb |
| Formic Acid | 5000 lb | 1,1,1-Trichloroethane | 1000 lb |
| Furfural | 5000 lb | Triethylamine | 5000 lb |
| Hydrochloric Acid | 5000 lb | Trimethylamine | 100 lb |
| Hydrofluoric Acid | 100 lb | Xylene | 1000 lb |
| Hydrazine | 1 lb | Zinc Bromide | 1000 lb |
| | | Zinc Chloride | 1000 lb |

Hazardous Wastes with As, Cd, Cr, Hg (Only if waste is not exempted, RQ is for metal content within total waste)

1 lb

Nondesignated substances that becomes a waste before or after the spill and display ignitable, corrosive, and/or reactive characteristics

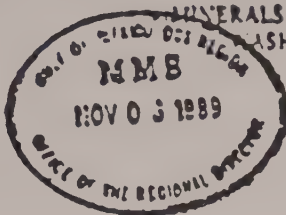
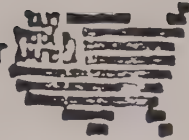
100 lb

Extremely Hazardous Substance (SARA) - not a CERCLA hazardous substance

1 lb



United States Department of the Interior



Memorandum

To: Regional Director, Gulf of Mexico OCS Region
From: Associate Director for Offshore Minerals Management
Subject: Responsibility of Assignors and Assignees

In a memorandum dated September 19, 1989, your office questioned the correctness of the Director's interpretation of 30 CFR 256.62(d) and (e) which was transmitted to Amoco Production Company (Amoco) in a letter dated June 6, 1988. That letter stated:

It is our position that if the assignee is unable to fulfill its obligations to plug and abandon wells and remove facilities, that Interior will not proceed against the original lessee-assignor to perform those functions.

Your memorandum expressed the belief that the correct interpretation of 30 CFR 256.62(d) and (e) would hold that:

... the assignor is responsible for the plugging and abandonment of wells and removal of facilities installed prior to assignment in the event of default by an assignee.

Reconsideration of the Director's interpretation of 30 CFR 256.62(d) and (e) was requested in your September 19, 1989, memorandum. You also expressed the following questions as concerns.

1. To whom will Minerals Management Service (MMS) turn for fulfillment of lease clearance obligations in the event of the default of an assignee?
2. What can MMS do to prevent the wholesale transfer of numerous properties, each burdened with extensive abandonment responsibilities, on to what in effect may turn out to be "dummy" companies relative to their ability to deal with responsibilities MMS has allowed them to absorb?

While we understand your interest in seeing a different interpretation placed on the provisions of 30 CFR 256.62(d) and (e), we must reaffirm the position expressed in the Director's letter dated June 6, 1988, to Amoco.

Once the Secretary's designee unconditionally approves the assignment of a lease, the assignee must be looked to for the fulfillment of "all" obligations under the lease. Thus, MMS faces the same situation when a subsequent lessee

(assignee) defaults in an obligation as it would face if the original lessee defaults in an obligation.

In order to prevent the wholesale transfer of numerous properties, each burdened with extensive abandonment responsibilities, onto lessees who are financially incapable of dealing with those responsibilities, MMS officials must recognize their responsibility to disapprove lease assignments to persons incapable of demonstrating financial competence. It may be necessary, in some instances, for the current lessee to remove certain facilities prior to the approval of the assignment. For leases containing wells and other facilities that may involve substantial abandonment expense, the assignor may choose to agree in writing to remain liable for the abandonment of all wells and facilities and the clearance of well and platform sites. In such cases, since the ultimate responsibility has been retained by the assignor, it would be appropriate to require the assignor to continue to maintain such bonds as may be required by MMS for the lease in question. To guard against issues of liability that might arise during abandonment, it must be clear that the assignor has retained responsibility for abandonment or clearance actions voluntarily as a term of the lease assignment transaction in consideration of other benefits gained from the assignment.

A Notice of Proposed Rulemaking (NPR) that would specifically require additional bond coverage under 30 CFR 256.61 when a lessee submits an Exploration Plan and again when a lessee submits a Development and Production Plan or a Development Operations Coordination Document has been prepared for recommendation to the Director. If the Director and the Assistant Secretary for Land and Minerals Management approve that proposal, the NPR could be published in the Federal Register before the end of the year.

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